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Critical Veneration and the Art of Constitutional Aspirationalism

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Critical Veneration and the Art of Constitutional Aspirationalism

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Dedication

For Bob, whose devotion to this project kept it going till the end

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Critical Veneration and the Art of Constitutional Aspirationalism

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In this dissertation I will argue that what I call critical veneration of the American Constitution is necessary to realizing the aspirations we, as American citizens, have set for ourselves in the Declaration of Independence and the Preamble to the Constitution. I begin from James Madison's concept of blind veneration, which he argues in the 14th *Federalist* is dangerous because it blinds people to the necessity of changing governments to suit new or changed peoples. However, Madison does not support critical veneration either. Rather, he is a proponent of what I call cautious veneration: "'The people…ought to be enlightened, to be awakened, to be united, that after establishing a government they should watch over it, as well as obey it.'"[1] I call this cautious veneration because it involves more active and critical thought than blind veneration, but it falls short of the evaluative and normative standards that I associate with critical veneration. Madisonian cautious veneration is tethered more tightly to the existing Constitution than to aspirations set forth in the Constitution: in particular, the promise of continual moral and political improvement achieved over the historical span

[1] (Gibson, Alan. 2005. "Veneration and Vigilance: James Madison and Public Opinion, 1785-1800." *The Review of Politics* 67 2005, 19.

of the American project, so long as it should last. Critical veneration, on the other hand, must be joined with a theory of aspirational constitutionalism, which requires simultaneous reverence for the Constitution and critique of that Constitution's inadequacies in order to push the country forward towards realizing its aspirations.

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Introduction

The American Constitution is a project. It is not static, nor is the order it inaugurates. The simplest way we can easily identify places where it has changed is to look at its amendments. Some of these changes have been profound, like ending slavery, and some of these changes have been merely procedural, like adjusting—or rather not adjusting—compensation for Congress. But then there are amendments that are both profound and procedural, like the 12th amendment that changed the mode of electing presidents. This is procedural insofar as it deals with election procedure—seemingly boring reforms, but also profound because it effectively condones the party system that the founders wanted to avoid at the start. This is not to say that there was not previous party action. The founders' attempt at abstinence from parties only lasted roughly through George Washington's first term. But the 12th amendment significantly altered the procedural structure of the federal election system by joining Presidents and Vice Presidents on the same ticket. The implicit sanction of parties by the men who cried faction when the Constitution was being created lends the profundity to this argument. There was, to be sure, a practical problem in electing Presidents and Vice Presidents potentially from different parties, but the profound change was that these men, the founders of our constitutional order, were able to make their peace with parties. This is significant not merely because parties were no longer seen as factional, but even more so because the founders' demonstrated in this amendment that the Constitution was changeable, even so soon after its ratification. Thus, the Constitution is set up to be a project that can continually build on itself in both procedural and profound or symbolic ways.

The American Constitution is also a project of interpretation by the branches of government it establishes. Although most lawyers, legal scholars, and ordinary citizens consider the Supreme Court's opinions to be supreme over all other interpretations, they are not the only voices in this debate. The reason that we can also find prominent Americans like Andrew Jackson or Abraham Lincoln who argue that all branches of government are entitled to interpret the Constitution is that all three branches of government have both the legitimacy and the authority to interpret constitutional texts. Furthermore, opinions from various branches might be more or less important depending on the issue at hand. So we see another aspect of the project—namely that political debate is an intrinsic part of constitutional interpretation and processes. Our Constitution creates a framework for the interpretive structure of statutory law that expands or contracts the scope of vague constitutional provisions. It also provides for a high Court that provides the room for the judicial opinions that declare pieces of that legislation unconstitutional. There are also the executive opinions that ignore the Court or reinterpret statute. In these modes, the American project is constantly unfolding. Without a Constitution that specifies these tasks to branches of the government it establishes, the American project would be impossible, because the Constitution does not interpret and enforce itself. It requires human actors to put it into motion, and for the Constitution's structures to work properly, all of the branches and departments must be in the business of constitutional interpretation when they enact law, enforce law, or judge based upon law.

But when I declare the American Constitution to be a project, I mean something that is larger than any of the possibilities I have sketched thus far. The American Constitution becomes a project because its citizens relate to it, a relation that we should label veneration, as James Madison originally labeled it in the American founding.

Constitutional veneration is a reverence that people have towards their Constitution. We learn that Americans venerate the Constitution—and by extension the entire constitutional order through political tradition—by observing them engaging within their constitutional order. Congress fights for flag burning amendments. Schoolchildren memorize the Preamble to the Constitution. Lines of people who are waiting to see the actual Constitution wrap around the National Archives building in Washington, D.C. People protest in front of the Supreme Court building. This is not to say that all of these actions are equally good for our country, or that any constitutional officer is necessarily correct in attributing constitutionality to her particular view, but that these attempts most definitely count as engaging within a constitutional order, engaging the process without questioning its foundational authority.[2] This sort of behavior is likely either to derive from veneration or encourage us to venerate our Constitution. Furthermore—and he was right in this statement—James Madison warned us in *Federalist* #49 that our Constitution would not survive without veneration, veneration that would seem to need to be both a baseline for civic engagement and a way of learning to be a member of American society.

Constitutional veneration is a reverence not towards all constitutions, but towards a particular constitution—in this case the American Constitution. It is an attachment to, a bond with, a dedication to, protectiveness towards, and a devotion to the Constitution of the United States. But not all veneration is alike. There are three types of constitutional veneration—blind veneration, cautious veneration, and critical veneration. Blind veneration is defined by James Madison as an unthinking reverence for persons or institutions, including constitutions.[3] Cautious veneration is still very much tied to a

[2] For one example in the press of this phenomenon, see Dionne Jr., E. J. "The Founders True Spirit." *The Washington Post*. 4 July 2012.

[3] Madison, *Federalist* 14 in Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers*. New York: Signet Classic, 2003.

people's constitution, but is more open to potential changes, a stance James Madison takes in the period of 1790-1792 when he was writing his *National Gazette* essays. In this period, Madison sketched out a more robust idea of veneration that calls for a rational yet emotionally-involved citizenry. As he writes, "'The people…ought to be enlightened, to be awakened, to be united, that after establishing a government they should watch over it, as well as obey it.'"[4] I call this cautious veneration because it involves more active and critical thought than blind veneration, but it falls short of what I will define as critical veneration, for it is more closely tethered to governmental institutions than to aspirations in the Constitution. Cautious veneration is necessary, especially in the beginning of a government, because it makes citizens think a bit about what is required for good government. But in my view, cautious veneration is not enough.

Rather, I advocate what I call critical veneration. Critical veneration begins from the same point as cautious veneration: a thinking reverence for constitutions. But critical veneration is more rebellious. It moves, as we will see in Chapter 1, beyond a Madisonian interpretation of government to add in a touch of Jeffersonian rebellion. These men are especially important to study, as I will note later in the Introduction, because they adapted these concepts for the American people. It is not that no one had ever though of veneration before, but their discussion in letters and in more public venues, like the newspaper articles called the *Federalist Papers*, made these concepts accessible to a new nation when it needed a grounding in veneration and was in the process of rebelling against the Crown. Critical veneration is a term I use to encapsulate the thinking reverence of the American Constitution that attaches itself most strongly to our constitutional aspirations. Constitutional aspirations are goals that people have for

[4] Gibson, Alan. 2005. "Veneration and Vigilance: James Madison and Public Opinion, 1785-1800." *The Review of Politics* 67 2005, 19.

the Constitution, and in order to advance the American project, it is necessary to have those goals always in sight. Operating in the mode of critical veneration, a citizen admires the Constitution and simultaneously sees the places where it is weak or deeply problematic and advocates change in that constitution. For example, in Chapter 2, I discuss Frederick Douglass, whose liminal status as an ex-slave renders him an instructive example for understanding how veneration and rebellion can be combined. Douglass was a slave before escaping: why should he partake in constitutional veneration, as I argue he does? He does so for two reasons. First, he does not believe that the Constitution is inherently a pro-slavery document. Second, he believes in the aspiration of freedom that the American project contains and from there argues that the Constitution can be redeemed in order to keep its promises to the entire body politic, even those originally discriminated against for their race. Had he been a Garrisonian permanently and kept with the tenets of that political position, Frederick Douglass would have considered the Constitution a suicide pact for slaves and stayed out of American politics. It is important that he rebelled against this position not just because he was then able to be a model for blacks in his own time and in times to follow, but because he showed us how we should approach the Constitution, even as a society that has abolished slavery. We must think about the Constitution lovingly, but not blindly. There are still problems that, were he alive today, Douglass would urge us to confront in various ways. Ultimately, Frederick Douglass understood that America was a project and it is in precisely this way that I mean that the Constitution is a project: it can be, and indeed is meant to be, challenged and developed in order to more fully realize the aspirations contained within it.

This project of critical veneration requires constitutional aspirations in order to function properly. Constitutional aspirations, put more simply, are the goals that people

have for constitutions. More specifically, there are particular goals or aspirations that citizens have for America, and it is for that reason that they continue to pursue the project of critical veneration of the peculiarly American Constitution. As we will see in Chapter 6, the American political tradition creates and encourages patriotic sentiments in its citizens. One may venerate certain democratic ideals in the abstract, such as human rights; again, in Chapter 6 we will examine international human rights and note how America resembles—or does not resemble—other countries in its treatment of them. But for a project like venerating a constitution, one must choose a particular constitution. It is not possible to venerate a constitution in the abstract because as much as veneration is based on aspirations, it also must have institutions that work to realize those aspirations. After all, throwing away the institutions without replacing them would not yield a government that works.

All venerators of the Constitution must see at least parts of the Constitution's aspirational or institutional content as worth preserving for the next generation. There must be a reason that we do not scrap constitutions every 19 years as Thomas Jefferson recommended. Jefferson argued in a letter to James Madison that I will treat in Chapter 1 that because the earth belongs to the living generation, not the past or the future generations who will live in the same country, only the present generation has the right to make laws for itself, including constitutional law. However, in order for critical veneration to work—or really to have any veneration at all—we cannot quite be Jeffersonians. We can want some of the changes Jeffersonians might want, such as keeping the Constitution tied mainly to the needs of the current generation rather than to generations ago, but ultimately critical venerators cannot condone a repetitive starting-over movement that Jefferson advises. They require a constitution be good enough so that they can make it better, or to use Jack Balkin's terminology, so that they can redeem

it, so that they can cash the check and receive the goods promised by the nation's most important founding document. Constitutional redemption results from the change that comes out of applying constitutional veneration and aspiration. Balkin[5] defines constitutional redemption as

> not simply reform, but change that fulfills a promise of the past. Redemption does not mean discarding the existing Constitution and substituting a new one, but returning the Constitution we have to its correct path, pushing it closer to what we take to be its true nature, and discarding the dross of past moral compromise.[6]

Thus, as we argue according to our aspirations about how to get to where we are going, we make our decisions together as political actors for our Constitution. We continually redeem our Constitution with each political action that brings it closer to reflecting what it ought to be. This system of redemption is ultimately one that relies on contestation within a democracy, for the arguments that bring about change are fueled by conflicting aspirations for the Constitution.

We contest each other about our aspirations because we do not all share the same aspirations for where the Constitution might go. In this vein, it is useful to examine constitutional identity and the relationship between identity and tradition. Constitutional identity, according to Gary Jacobsohn, "emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past."[7] Constitutional identity needs to emerge dialogically because there are many aspirations contained in every society and so a dialogue among the various groups—and sometimes even factions—within society is needed. This understanding of constitutional identity

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[5] Balkin, Jack. *Constitutional Redemption: Political Faith in an Unjust World*. Cambridge: Harvard University Press, 2011.
[6] Balkin, *Constitutional Redemption*, 5-6.
[7] Jacobsohn, Gary Jeffrey. *Constitutional Identity*. Cambridge: Harvard University Press, 2010, 7, italics Jacobsohn's.

allows for a constitution to evolve and be shaped by constitutional aspirations as I define them in this dissertation: a set or several sets of shared principles and ideals that work at creating and recreating an ideal polity but which do not necessarily mesh easily together. Because aspirations can be very different or even opposed to each other, constitutional identity must be formed through the sort of dialogue that Jacobsohn refers to.

How, one might ask, can this sort of dialogue be possible, especially dialogue that includes factional elements of society? It would seem necessary for all groups to have a commitment to the basic principles enshrined in founding documents, not just an attachment to principles generally. Interpreting these principles is difficult, however, and so we must wonder how a large democracy, rather than a small democracy or republic, can handle this much conflict between the people who are supposed to support the government. It does not help to know that these conflicts are inevitable even among small groups: what we must attempt to understand is how to channel them into productive conversations. Deliberative democrats have done some work on this process,[8] and I tend to agree with their conclusion that if people are sufficiently informed, they are able to have serious conversations with each other about political matters. Though, unfortunately, a sunny ending to these aspirational problems cannot always be guaranteed, much as we might hope it to be possible.

And so here I establish the second-most important concept of this dissertation: aspirational conflict theory. Throughout my main study of what I call critical veneration, I will interpret aspirational conflict as a theory that encapsulates the conflictual relationship between constitutional veneration, aspirations, and theories of redemption. Some people will venerate certain parts of our constitutional order more than others. For

[8] See a variety of studies done by James Fishkin at his Center for Deliberative Democracy: <http://cdd.stanford.edu/> Accessed 6 September 2011.

example, I will show that Mark Graber is generally not an aspirationalist in Chapter 2, but he does place a high value on the promise our Preamble makes to "ensure domestic tranquility." He does not call it an aspiration per se, but rather a requirement, along with "provid[ing] for the common defense," to govern people as a nation at all.[9] I bring this distinction Graber points out here in order to contrast him with those he calls Lincolnians, who value "establish[ing] justice" above all else. This valuing of certain parts of the Preamble over others can turn very controversial, and thus aspirational conflict is born. A further difficulty is added when we realize that just because a group of people value "justice" that they do not necessarily have the same definition of justice, potentially causing more conflict.

This problem is particularly relevant if we consider the possibility of war. I will examine this in more depth with relation to Graber's work in Chapter 2, but in short, he argues that because conflicts about aspirations can build to war, aspirations become very dangerous and probably not salutary parts of political regimes. I agree with Graber that war is possible as a form of aspirational conflict, and we both discuss the same war: the American Civil War. However, like Frederick Douglass and unlike Mark Graber, I think war is justifiable and even necessary under certain circumstances. This is the worst of what I call aspirational conflict theory—that which requires the loss of human life. Unfortunately, such conflict seems to be a part of politics if the compromises Graber would like to govern us forever (i.e. The Great Compromise), like those among slave and free states, are not compromises that we can sustain over the long haul. This is not to say that we should enter wars indiscriminately, because we should only enter wars if they conflict with our deepest aspirations (for example, our aspirations to liberty and equality

[9] See the conclusion to Chapter 3 for more on Graber's view.

made slavery deeply incompatible with our constitutional regime). It is always preferable that we find solutions that do not require war to meet our aspirations with compatible constitutional arrangements.

Critical constitutional veneration shows the way to constitutional aspirations and constitutional redemption and requires that people think seriously and creatively about their constitutional beliefs and values. Constitutional aspiration, building off of rational discourse and patriotic sentiment, consists of the goals people have for a particular constitution. Constitutional redemption aims to change bad or even evil parts of the constitution so to enable progress towards an ideal version of it. Thus we can see how aspirational conflict comes together: out of different identities, some formed by the Constitution and some not, we learn to critically venerate our Constitution by aspiring to redeem its promise(s). In life under the Constitution, learning to be critical venerators means that we must be able to identify parts of the Constitution that are not perfect. In this dissertation, I will distinguish between two parts of the Constitution, the institutional or procedural pieces and the aspirational pieces. The institutional pieces are simple to identify and to generally understand, though the Court certainly can twist them about if they so decide—as can, of course, the other branches of government. Aspirational pieces, however, must be subject to interpretation by their nature.

The Preamble is the ultimate aspirational piece of the Constitution. It contains what we hope our law will do. The 'we' that hope is certainly not univocal even as it represents the "we" in "we the people," and so it is difficult to know what interpretation the Preamble will garner because "we" is not a fixed identity position. In truth, it is very unusual for anyone to cite the Preamble besides academics—legal scholars and judges ignore the Preamble. Fortunately, the principles contained in the Preamble are generally considered to be fundamental American values: justice, domestic tranquility, common

defense, general welfare, and the blessings of liberty. One could also identify the republican form of government guarantee in the Constitution as aspirational, though this is another section of our Constitution that has never made it properly into case law or judicial decision-making. This absence of these pieces of the Constitution from legal proceedings, however, does not condemn the Preamble to obscurity, as the other branches and sometimes even social movements can use those principles to advance their ends. Then there are parts of the Constitution that can be read to help along the aspirational cause but are law more than aspiration, such as the 9th and the 14th amendments. From their relatively simple phrases comes a whole body of law, Court opinion, and the results of popular movements that discuss what sorts of rights we have and we aspire to have. This focus on rights will be continued in Chapters 5 and 6, because rights provisions are the easiest place to enshrine our aspirations for ourselves as a people in a way that can be legally enforced.

So how can we critically venerate the aspirational pieces of our Constitution? We start from agreeing with the principles enshrined in the document. And, to assist us in more closely identifying America's key principles, we must style ourselves Lincolnians and read the principles of the Constitution through the lens of the Declaration of Independence to understand the Constitution at its best. After all, when Americans think of American principles, they do not forget life, liberty, and the pursuit of happiness, even if they do not immediately think of those principles as a part of American constitutional law. So we take our principles and then consider how they are reflected in the constitutional design of our system. In short, proper constitutional veneration requires an inclusive consideration of founding and other seminal American documents that must be interpreted both as they were intended and for our new problems today. For example, if we aim to "form a more perfect Union," then we ought to agree with Lincoln on the issue

of secession. However, as simple as that example might seem, it proves not to be simple at all. Another phrase in the Preamble, "insure domestic Tranquility," does not fit with the Civil War Lincoln's principle of union began. This becomes even more complicated if we consider one American value found in the Declaration—to obtain the consent of the governed—because both sides of the Civil War were fighting with the consent of at least some of their governed. This very brief examination of Lincolnian constitutionalism shows that one can have a coherent aspirational view, albeit never one unchallenged by others.

That this governance is built upon critical veneration makes the project that much harder. The difficulty of identifying the correct principle for the moment cannot be abandoned, however, because the soul of the nation rests on such impossible decisions. The most important question in our history was: Should we free the slaves? The answer seems obvious now, and it is also obvious that it wasn't obvious at the time. Thus I return to my statement that critical veneration of the Constitution is a project. This project is important because ultimately it determines, especially in the case of the Civil War, how the state decides who lives and who dies, how it decides whose life was in service of good and whose of evil, or at least whose life being lost was based on a gross miscalculation. The state in these cases certainly uses the popular will to decide how to decide who live and dies, but the opinion of the people is largely determined by how they interpret law. Interpreting the law, especially constitutional law, is the work of people with aspirations for what their polity will look like, and necessarily concerns what kind of actions the government is able to take. As we will see in Chapter 2, Mark Graber is deeply concerned about the results of aspirationalism because aspirations can lead to war. For that reason he is highly skeptical of aspirational projects like Jack Balkin's project of redemption. Ultimately he would no doubt be skeptical of my project of critical

veneration as well. And yet we cannot and should not demonize Graber as anti-American—there are good, American reasons for being opposed to constitutional projects that lead to civil wars.

Aspirations about how the state will conduct itself in matters of war and peace, life and death, do not immediately appear to come out of veneration the citizens have for the Constitution. As I argued in the beginning of this Introduction, citizens see their law reflected through a strong veneration for the constitutional order. Even people on the opposite ends of an argument—say, the death penalty—use the Constitution to make their arguments. Some say that for the state to kill people is cruel and unusual, some say it is not and that such punishments are reasonable under the constitutional law of the polity we are trying to be. Aspirations link to veneration, even blind veneration, because even in the case of the death penalty, though the citizens may be confused about what the government is allowed to do, they believe it serves their aspirations. Preserving life can be just as much an aspiration as protecting citizens from criminals who may strike again.

Making the jump to the practice of critical veneration exposes the fact taken for granted that our Constitution is not perfect and those aspirations can be better realized with some changes to the constitutional order. The aspirations themselves, however, need not change when one rejects blind in favor of critical veneration. Only the people who interpret how the aspirations work within a venerated system can change their minds as to what kind of veneration they accept. In the case of the death penalty, citizens must argue in courts, in Congressional sessions, during sessions of pardoning boards, and even in the contemporary equivalents of town meetings along with meetings of activists who take up the issue of punishment as their cause. If ultimately capital punishment is decided to be the most just recourse in these cases, then our aspiration is met on the national level by continuing to sentence defendants to death. If however, capital punishment is ruled to be

cruel and unusual, in accordance with most of the public opinion and legal opinion in the rest of the world, then the aspiration must be to change the structure of current American criminal law. In this case, one side aspires to safety of most citizens, where the other side aspires to keep everyone alive. There is not an obvious and careful answer to which of those aspirations should be held above the other, because it seems likely that even the strictest capital punishment supporters advocate citizens being protected in their right to life, and the strictest capital punishment opponents advocate safety for all. Thus we can see how constitutional controversies arise from personal opinions that are a part of people's extra-constitutional identities. The government certainly did not tell any of these individuals to believe a certain way on the issue of capital punishment, but rather allowed for their intellectual development in either direction. That development shapes people's veneration of the Constitution and the aspirations they have for it. Critical veneration relies on a basic trust in constitutional authority to settle disputes. So the political debate is not only an inevitable result of critical veneration, but also creates the conditions under which citizens can venerate.

Ultimately, despite all of our differences, veneration is what binds us to the Constitution. Without veneration, there is no reason not to follow Jefferson and scrap the document altogether in favor of a new one that helps us aspire to better principles. What does this mean? It means that our Constitution provides the space where certain kinds of aspirations are enshrined, described in the Declaration of Independence, the Preamble to the Constitution, and the Bill of Rights and other constitutional amendments, are enshrined as fundamental American values that the nation attempts to enact. If those aspirations are no longer what we want for ourselves as a people, we should create a totally different government that helps us realize different aspirations. This is not to say our present Constitution perfectly realizes our aspirations at the moment; it certainly does

not. But according to our body of founding documents is made for certain kinds of work and not for other sorts of work. This theme of constitutional work will be taken up in part in Chapter 3, where we will discuss the illegal transition from the Articles of Confederation to the Constitution. The Articles of Confederation had a particular vision of America that it was aiming to protect, but James Madison and his contemporaries decided that that path was not acceptable for a nation, only for a loose confederation of states that was not sufficing for their confederation. And yet both constitutions managed to aim at one of the same results: perpetual union. The Articles make that clear from the opening lines; the Constitution does not make that clear but Abraham Lincoln assumes it. Thus the Constitution's goal of Union is only made perfectly explicit by what the winners of the Civil War decided would be the aspiration of the nation.

That a core value of the Constitution—namely, slavery—needed to be settled through a war and major dispute to settle core values is characteristic of the American project—and that people resorted to violence is indicative of the urgency with which individuals are attached to their constitutional aspirations. Although we have principles in our Preamble and Declaration, they become constitutive through great struggle, not as a result of being written down. This great struggle, as we will see in the Conclusion, however, need not always be physically violent. For example, the Reverend Dr. Martin Luther King Jr. was able to build a more successful movement out of non-violence than his contemporary Malcolm X was with his call to violent resistance to racial inequality. But the Civil Rights Movement was certainly a struggle, one that required what will later be defined as metaphorical violence, which, in short, is the change in laws that unsettles lives and precedents in order to bring about novel things. For example, the Voting Rights Act of 1964 made it illegal for racist southerners to dominate elections, thereby taking away part of their influence and giving it to African Americans. Change is always

disruptive and can sometimes be ruinous to particular individuals or groups. But in retrospect, supporters and opponents of Jim Crow segregation were not justified in having the rights they once held as a matter of course over slaves and people of different races.

A constitution must be more than a written document, at least as Americans practice constitutionalism as truly constitutive of a people with a coherent national identity. There have been constitutions—for example, the Soviet Constitution—that were not meant to be implemented, but rather created as a fiction for outsiders. The American Constitution, by contrast, is taken very seriously as the law of the land for everyone living in America. The Constitution's aspirational pieces—along with those of the Declaration—are constitutive of us as a people. Thus, aspirations are created from differences in moral views among smaller communities, but also work to mediate those different communities into a coherent—albeit complicated and messy—national community. Now, putting the Constitution and the Declaration in the same breath is dangerous, because, as we will see in Chapter 1, Jeffersonian theory would become very different if we are to argue that he venerates the Declaration. If all that was needed to venerate the Constitution was to adopt its principles, Jefferson would be a strong venerator of the system, rather than the rebel he will be portrayed as during this dissertation. However, as I will argue in Chapter 1, using principles to justify the right to revolution is not enough to be a venerative act. Critical veneration is between the pole of blind veneration and rebellious aspirationalism, where the former teaches us to love our Constitution and the latter teaches us to think about our love critically. It is possible that that love leads us to rebel against the Constitution, but here rebellion is inflected as a less serious break than a revolutionary would make from the Constitution, meaning instead a rebellion that keeps our principles alive and allows us to discuss them critically with

reference to the institutions that we have inherited from the past. Having moderated rebellion in this dissertation is an act consonant with constitutional veneration.

My work takes several cues from Sanford Levinson's book, *Constitutional Faith*, which usefully employs religious terminology to explain redemption in political terms. His particular religious delineations—Catholicism and Protestantism—fall outside of traditional legal or academic discourse and thus make comprehending the main stances I will take in this work more understandable. My dissertation is an exercise in constitutional Protestantism and Catholicism at once, albeit on different dimensions from Levinson's scale. It is Catholic insofar as "the source of the doctrine is the text of the Constitution plus unwritten tradition."[10] In other words, my view of constitutional interpretation includes more than just the Constitution, which is here the scholarly and secular equivalent of the written text of the Bible. Just as Catholics include the teachings of the Popes and bishops over the centuries, stories of Saints, and writings of influential theologians to properly interpret the Bible, the Constitution needs the Declaration of Independence and constitutional amendments as already mentioned, but also the Congressional Record, Presidential speeches, and Supreme Court decisions to be adequately interpreted. However, this dissertation is also Protestant insofar as "the ultimate authority to interpret the source of doctrine…is based on the legitimacy of individualized (or at least nonhierarchical communal) interpretation."[11] Protestants, taking their example from Martin Luther, do not rely on Popes for authority, much in the same way that the Constitution need not rely only on the Supreme Court for authoritative interpretation. Protestant constitutionalism, in this paradigm, allows every citizen, group

[10] Levinson, Sanford. *Constitutional Faith*. Princeton University Press: Princeton, 1988, 29.
[11] Levinson, *Constitutional Faith*, 29.

of citizens, level of government, and branch of government to interpret the text of the Constitution for themselves.

Thus it is easy to see how Protestant and Catholic modes of interpretation conflict and require different modes of political interpretation. The Catholic dimension of this dissertation would seem to conflict with Douglass' stated Protestant view, but I will argue here that the difficulty is not as big as it may seem. Frederick Douglass wanted to interpret the Constitution in a very Protestant way, using "'the mere text, and only the text, and not any commentaries or creeds written by those who wished to give the text a meaning apart from its plain reading was adopted as the Constitution of the United States.'"[12] As much as I agree with Douglass on many constitutional issues, in the matter of interpreting the Constitution, the bare text of the Constitution is not enough. The principles enshrined in the Declaration of Independence add to American goals listed in the Preamble in an important way. Furthermore, it seems essential to constitutional veneration that more than just the text is available to citizens, even those such as Frederick Douglass who wish to reinterpret the Constitution. In fact, I would argue that Douglass did in fact use elements of constitutional Catholicism in his interpretations: he invoked the founding zeitgeist of liberty never mentioned in the Constitution when he made his arguments for the Constitution being read as an anti-slavery document. Obviously, Douglass was a man who respected the Declaration of Independence, and I think it likely that his emphasis on liberty may have come from that source.

This work's Protestantism is also essential to critical veneration, as it is based on the argument that the Supreme Court is not the sole arbiter of constitutionality. Andrew

[12] Levinson, *Constitutional Faith*, 31.

Jackson set us off on the path of disagreeing with the Court,[13] but most germane to this dissertation is Lincoln's refusal to allow *Dred Scott* to become a precedent set for all time. Lincoln refused the idea of the Court's constitutional supremacy. The founders, namely James Madison and Alexander Hamilton in the *Federalist Papers*, made an argument for coequal branches of government, which means that the Supreme Court was not endowed with extra authority to interpret the Constitution. The founders also helped to draft a Constitution wherein all constitutional officers must take oaths to "preserve, protect and defend" or "support" this Constitution. Therefore, it is not necessary to take a Court-centered view of constitutionalism,[14] even if the principles the Court chooses to elevate to constitutional stature fit with the principles of the American project. From time to time, it may even fall to Protestant-interpreters to do what FDR encouraged in 1937, where he declares we have "'reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself…We want a Supreme Court which will do justice under the Constitution—not over it." Of course this was a political program designed to garner support for the Court-packing program,[15] but it is a view that should be considered in its basic form: is the Court acting as a coequal branch under the Constitution, or is it trying to usurp the mantle of authority from the Constitution?

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[13] "I have also found, however, a countervailing inclination among informed Americans, regardless of their ideological persuasion, to differentiate between the Constitution and the Court. Sometimes this inclination has been propelled by political expediency: that was true of Andrew Jackson's veto in 1832, when Congress and the Court upheld the constitutionality of the Bank of the United States; or of Lincoln in 1861, explaining his prospective policies; or of FDR in 1937, during the 'Court-packing' controversy..." Kammen, Michael. *A Machine That Would Go Of Itself*. Transaction Publishers: New Brunswick, 2006, 9.

[14] One such "Court-centered" view is that of Ronald Dworkin, where Hercules the Judge rules over constitutional decisionmaking. See Dworkin, Ronald, *Taking Rights Seriously*. Harvard University Press: Cambridge, 1977.

[15] Kammen, *A Machine*, 9.

To talk about these principles, this dissertation will spend a great deal of time on constitutional aspirationalism. Returning again to Lincoln and his disapproval of *Dred Scott*, Gary Jacobsohn argues that "It has been persuasively and correctly argued that Lincoln's reaction to *Dred Scott* was consistent with 'The animating genius of the Founders' vision [which] was that each and every institution could be…'active'—because the activity of each branch could, within the internal structure of power, be watched, balanced, and checked.'"[16] This interpretation of Lincoln embodies a theory of constitutional aspirationalism, as "Lincoln saw the Constitution as both a legal code and a statement of the ideas which we as a people chose 'in the end to live by.'"[17] As stated in the beginning of this Introduction, this sort of aspirationalism—combining ideals and institutions—is a necessary tool of critical veneration, as the ideals raise our sights to what our institutions ought to be and ought to be doing.

Moving out of the Levinsonian ambit a bit, it seems that it is necessary to describe further what mode of constitutional interpretation this dissertation is suggesting. I am not making an argument for pure constitutional democracy, constitutional populism, or whatever phrase one chooses, though it does include elements of those theories.[18] But this project is also profoundly influenced by James Madison, whose skepticism about the capacity of the people to interpret the Constitution properly caused him to write such *Federalist Papers* as #51. There, ambition is made to counter ambition by making our government officials attached to their branches as a source of pride and rivalry. The

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[16] Jacobsohn, Gary. *The Supreme Court and the Decline of Constitutional Aspiration*. Rowman and Littlefield Publishers, Inc: Totawa, 1986, 109

[17] Jacobsohn, *The Supreme Court*, 109.

[18] For democratic constitutionalism, see later in this dissertation: Post, Robert and Reva Siegel. "Roe Rage: Democratic Constitutionalism and Backlash." *43 Harv. C.R.-C.L.L L.Rev 373*, 374. For popular constitutionalism, see Tushnet, Mark. *Taking the Constitution Away from the Courts*. Princeton University Press: Princeton, 1999.

people are not asked to do much in that particular articulation of Madisonian constitutional theory, besides relying on their representatives to interpret and debate the Constitution for them.

Ultimately, what is most important to the American project is that the Constitution constitutes the people. As Aristotle notes in his *Politics*, "Whoever is entitled to participate in an office involving deliberation or decision is…a citizen in this city; and the city is the multitude of such persons that is adequate with a view to a self-sufficient life, to speak simply."[19] If we leave aside Greek rules of the time concerning slaves, women, etc., this becomes a good starting point for learning what constitutes a people. It is not a coincidence that Madison, Jefferson, and the rest of the founders were familiar with the writings of these ancient men. These people, as Aristotle argues,[20] must be able to rule and be ruled at once. What is best is if citizens are able to rule in high office and then still be content under another's rule once they are done, as Machiavelli suggests. They should also have the same education.[21] But how can a constitution educate people?

First they must have a tradition. But as time progresses, there is a group of (Catholic) documents that will accrue to that constitution. As Ahkil Amar argues, Americans have a written Constitution and an unwritten Constitution: "Neither…stands alone. Rather, the two stand together and support each other. The unwritten Constitution, properly understood, helps make sense of the written text. In turn, the written text presupposes and invites certain forms of interpretation that go beyond clause-

[19] Aristotle, *Politics*, trans. Carnes Lord. University of Chicago Press: Chicago, 1984. 87 (1275bl)
[20] Aristotle, *Politics*, 183, (1317bl)
[21] Aristotle, *Politics*, 229 (1337al)

bound literalism."[22] Documents such as the Declaration of Independence, the *Federalist Papers*, the Northwest Ordinance, the Gettysburg Address, *Brown v. Board*, and King's "I Have a Dream" speech are Amar's beginning examples. Some of these, especially the Declaration of Independence and the *Federalist Papers* will be major examples in this dissertation. More examples could certainly be added to this pantheon, but they all contribute to how we see ourselves as a constitutional people. From youth teachers tell us about the great feats and characters of our leaders, in particular George Washington and Abraham Lincoln. We memorize speeches, we salute the flag, we are trained to recite the Pledge of Allegiance, no matter where we are originally from, we are taught to be Americans. As we grow older, we are encouraged to vote, and Congress has made registering as easy as going to the Motor Vehicles Administration to register. We join groups, political, social, religious, or otherwise, and assimilate certain values, which we then teach to our children as aspirations for how our polity will develop.

How are these newly constituted people to learn to venerate their Constitution? From *Federalist* 49 it would seem that opinion is the only force that could quickly sweep in and convince a large body of people of a single opinion about politics. It seems strange that opinion would cause a people to have opinions. But it is intentional that this be somewhat circular because these opinions are supposed to be held without thinking, at least until they are held firmly, and then it is safe to introduce something like critical veneration. It is likely, despite his doubts about enlightened statesmen being available to guide the people, that Madison thought early leadership from men like George Washington would, in the American case, provide enough similarity of opinion to get the Constitution through its early period without strong veneration having yet developed.

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[22] Amar, Ahkil Reed. *America's Unwritten Constitution: The Precedents and Principles We Live By*. Basic Books: New York, 2012, 20.

But how long does veneration take to develop? In the United States, it may have taken far longer than we tend to think. As Michael Kammen notes "compared with the years 1875 to 1900, when Constitution worship was very strong indeed, overt criticism of the Constitution seems more common between 1788 and 1860 than after that date."[23] His historical account buttresses my claim that there is a thing called "veneration" that people actually feel, and is determined by the various people who live at certain times—that is to say, it is historically conditioned. This leads me to be confident that veneration—even critical veneration—can be made to flourish, even when it appears to be missing from the contemporary American spirit.

The problem of knowing how veneration will develop over time is a problem for practicing critical veneration. How can we know if, over time, our critical veneration is justified? What's more, if our veneration is critical, will it continue to exist? In short, how is this dissertation's defense of critical veneration not a profoundly Jeffersonian exercise that acts in a similar way to Jefferson's suggested conventions: as a tool of disservice to the stability of the nation? This is a question that should continue to be examined as the dissertation unfolds, but as a preliminary treatment of the issue, we must consider that veneration is not only of principles, but also of the institutions and processes—the procedural part of the Constitution—that continues to exist while we question it. Kammen summarizes the impetus behind the aspirational component of my project well when he states "Progress in history is rarely easy, however, and veneration has often become most intense as part of the process whereby controversies are resolved and issues resolved."[24] This claim expresses another aspect of aspirational conflict: veneration for the old system becomes stronger as changes take hold. This means that it

[23] Kammen, *A Machine*, 22.
[24] Kammen, *A Machine*, 38

will never be easy to convince staunch blind venerators of the Constitution to change anything about their beloved document. But those who truly love and trust the Constitution are the critical venerators, who allow the document to change in accordance with its own principles as we come to know what its principles entail over time. Moreover, the moving parts of the constitutional order continue to order our lives while we consider changes to it. Thus we are keenly aware that in order to change those fundamental parts, be they institutions or rights, we must put something in their place. We cannot be Wilsonians in practice without dismantling our presidential order and creating a parliamentary one. We cannot abandon the Electoral College because it is unrepresentative of the people and not think carefully about how a recount would work in a solely popular election. These are examples that are unlikely to come to fruition, and one reason that is true is because they would require wholesale change. In short, when we criticize we must be aware that our criticisms are of practical institutions that do certain things for us—even when most Americans are not specifically aware of what they do—and that to change them is a gargantuan undertaking. Moreover, in the specific Protestant mode in which this dissertation is written, we the people are responsible for creating anew if we destroy anew—or at the very least, for choosing the people who choose for us. Yet that is not always good enough, to choose who will choose. Sometimes the people must choose for themselves, as they do in social movements.

This returns us to the debates over Protestantism and Catholicism. Most people believe, like good Catholics, that the Supreme Court is also the supreme arbiter of what is constitutional and what is not. However, this dissertation argues that the people can do more, and if they knew that they could do more, they would, at least when it is monumentally important. That is the substance of critical veneration—that the blind, Catholic veneration of the Court is not enough to create good citizens who would indeed

know how to rule themselves under our Constitution. Now, to be sure, the American Constitution does not require excessively much of its citizenry—certainly not what Aristotle would require. Rather, the people are both the problem and the solution: they can be harnessed to protect rights and permanent interests of the community, if properly prepared to take on this task. "Madison placed his hopes for republican government in the acceptance of the citizenry of constitutional design," a design which would then create incentives for politicians to live inside the bounds of that design.[25]

From antiquity to modernity, a variety of thinkers argued for veneration of constitutional orders. To Aristotle's man who is constituted by politics to Madison's people who gain veneration through right opinion, from Rousseauian lawgiving indoctrinarians of the general will and civic religion to Burkean fealty to one's forefathers, there is no lack of talk of veneration or conceptions like it in our historical record of philosophy. The problem today is that most scholars are unconcerned with veneration unless they think it at least somewhat dangerous.[26] Veneration, especially in its blindest form, is dangerous if what you prize is an active constitutional people. It is very easy for people to be sucked into a void of complacency with their government, and care only about their family and friends, as Tocqueville predicted. The task of a government that sees itself as the product of critical veneration and wishes to remain that way is to activate the people, or, at the very least, to provide avenues for the people to be active and involved. One reason that so many legal and political theorists are flummoxed by Sanford Levinson's *Our Undemocratic Constitution* is that they—and the citizenry generally—have no conception of being actively involved in their government, much less

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[25] Elkin, Stephen. *Reconstructing the Commercial Republic*. University of Chicago Press: Chicago, 2006, 48-50.

[26] Levinson, Sanford. *Our Undemocratic Constitution*. Oxford University Press: Oxford, 2006; Sabato, Larry. Walker Publishing Company: New York, 2007.

of what kind of work it would take to have a popularly sanctioned—or perhaps even popular—convention to decide on new institutions for our government. This is not an easy problem to solve. Deliberative democrats, communitarians, and republicans are trying to solve this problem—which is not truly the subject of this dissertation—and they have come up with a variety of solutions to make the people more involved. But what they all have in common is that they ask people to think about their government on a regular basis.

Even Madison required some thought out of the citizenry to insist on the kind of veneration I call his cautious veneration. He needs the people to be constitutionally literate in order for them "'to be enlightened, to be awakened, to be united, that after establishing a government they should watch over it, as well as obey it.'"[27] This is a high bar, and it is possible that the people cannot be this way all of the time. Perhaps Bruce Ackerman is correct and there are specific times when the people, in what he calls a "dualist democracy," [28] are to be awakened from their slumber of ordinary times in order to become involved in the government. Perhaps that is all that we can hope for from a massive people not trained in ancient republican ways. But it would be an improvement from now if we could have Madisonian veneration, so much the more for critical veneration. Thus, this dissertation is not meant to signify that there is not good Madisonian veneration and that there are not good suggestions for improvement on our Constitution.

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[27] Gibson, Alan. 2005. "Veneration and Vigilance: James Madison and Public Opinion, 1785-1800." *The Review of Politics* 67 2005, 19.

[28] Ackerman, Bruce. *We the People I: Foundations*. Cambridge: The Belknap Press of Harvard University Press, 1991. I will treat this idea of Ackerman's, along with others of his writings and conceptual creations in Chapter 4.

Unfortunately, unlike the problem of civic involvement, which has many theorists working to fix, the problem of veneration is understudied. Most of the accounts of veneration—and they are few and far between—are historical.[29] This dissertation, and its use of Madison, intends to be at least minimally prescriptive—namely, it prescribes critical veneration as a good path for the American citizenry to follow. Historical accounts, by contrast, provide a basis for understanding veneration as an American political tradition—particularly Madisonian veneration. But this dissertation will not be a history of cycles of adulation for the Constitution, nor a sociological understanding of how we can to our system and began to venerate it—though pieces of each will be woven through specific parts of the text. Rather, it is to explain why critical veneration is necessary to the American project.

One scholar in whose tracks I follow on veneration is Alan Gibson.[30] He in fact does pay some attention to Madison as "a prescient democratic theorist."[31] Gibson notes "In general, both Madison's defenders and critics have failed to grasp how in the 1780s and the 1790s he conceived of the relationship of the people to their government as a process of *mutual* influence, censorship, and judgment."[32] Although my take on Madison is far closer to what Gibson calls Colleen Sheehan's interpretation of Madison—that public opinion should be understood as "statecraft as soulcraft"[33]—Gibson's focus on opinion in Madisonian thought, particularly during the *Federalist* and *National Gazette*

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[29] Sheehan, Colleen A. "Public Opinion and the Formation of Civic Character in Madison's Republican Theory." *The Review of Politics*. 67:1, 2005; Rosen, Gary. "James Madison and the Problem of Founding." 58, 1996; Howe, Daniel W. "The Political Psychology of the *Federalist*." *The William and Mary Quarterly*. 44:3, 1987.

[30] Gibson, Alan. "The Madisonian Madison and the Question of Consistency: The Significance and Challenge of Recent Research." *The Review of Politics*. 64:2. 2002; Gibson, Alan. "Veneration and Vigilance: James Madison and Public Opinion, 1785-1800." *The Review of Politics*. 67:1, 2005.

[31] Gibson, "Veneration and Vigilance," 9.

[32] Gibson, "Veneration and Vigilance," 30.

[33] Gibson, "Veneration and Vigilance," 32.

periods, is essential to understanding Madisonian political theory. Gibson's painting of Madison as a scholar of public opinion is well supported, and points us in the direction of taking Madison as a guide on such matters: "The irony that one of the most perceptive early analysts and defenders of this concept [of public opinion] is most often characterized as an opponent of democracy will not be lost on contemporary political scientists."[34] Despite my disagreement with Gibson that Madison is truly a democrat himself, I would argue that he does pave the way for democrats in the future. By advocating a cautious veneration by the people, he makes the people able to participate better in their government, which eventually led America from espousing republican sensibilities to democratic ones.

But ultimately Gibson is a scholar of the founding who throws in some contemporary reflections about the founding at the end of his article. On the contrary, this dissertation aims to discuss theoretical stances, in the thought of the founders—specifically James Madison and Thomas Jefferson—and political scientists and legal scholars of the day. Madison was not wrong. Veneration is necessary. But, as I will explain in Chapter 1, neither was Jefferson wrong to denigrate certain sorts of veneration. Madison and Jefferson are the first theorists of the American project. There are many who follow in their footsteps, but because they are practical politicians, political theorists, and even enlightened statesmen, they should be more interesting to us than contemporary theorists who have little acquaintance with the art of governance. Furthermore, they began anew. Large portions of the *Federalist Papers* are devoted to laying out how precisely we Americans will differ in our republic than those who came before us. This is beyond the scope of inquiry here, but all discovering that takes is a careful reading of

[34] Gibson, "Veneration and Vigilance," 35.

the *Federalist*. And everyone would agree that the Declaration of Independence was doing something new. So in Madison and Jefferson we have philosopher statesmen who come down from the heavens? Certainly not. They were not Rousseauian lawgivers, and, like George Washington, never intended to take the reins of government permanently for themselves. They understood what transfers of power were necessary for the new American experiment, even as each acted as President.

Jeremy Bailey has recently argued that Madison was not as much a fan of veneration as is often argued by scholars, given his advice on drafting a constitution to lawmakers in Kentucky. He notes that *Federalist* 49 was written at a very important historical time when the Constitution was under deep questioning, and that making arguments for veneration may have strengthened the Constitution's shot at being ratified. Though I would not go as far as Bailey does, I do agree with his statement: "for Madison, the benefits of constitutional veneration are mixed. Even if constitutional veneration can sometimes provide what deliberation cannot, there are serious reasons to be wary of it."[35] Furthermore, Madison was trying to please two constituencies: "Because Madison knew he could not close the discussion of republicanism that would answer the most scrupulous republicans (Jefferson), while at the same time relieving those most concerned with the deliberation of their constituent, Madison had to warn both sets of men against the excesses of the argument from deliberation." This leads Madison to a less stringent veneration, very close to what I call cautious veneration in this dissertation.[36]

Therefore, this dissertation will be presented in three parts of two chapters each, the first of which will be devoted to Madison and Jefferson, and one to contemporary

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[35] Bailey, Jeremy D. "Should We Venerate That Which We Cannot Love? James Madison on Constitutional Imperfection." *Political Research Quarterly.* 13 December 2011, 10.
[36] Bailey, "Should We Venerate," 11.

scholars who write on the same themes. Part one will discuss how critical veneration is born of the conflict between veneration and rebellion within our aspirations, dyad two will discuss potential dangerous exigencies in constitutional orders, and dyad three will discuss rights. These three concepts are essential to understanding critical veneration because they illuminate how it works: it is born out of our aspirations for certain rights in order to deal with the exigencies of the moment. Critical veneration is then fluid, as it moves according to the demands of the rulers and the ruled in order to best serve individual rights and the "permanent and aggregate interests of the community."[37]

Chapter 1 of the first Part features James Madison's writings on the importance of veneration, the kind of veneration I have defined as cautious veneration. He dismisses blind veneration as dangerous, but does not adopt a suitably critical, or Jeffersonian, stance toward constitutionalism. Thomas Jefferson's writings discussed in this chapter focus on the need for rebellion among the citizenry fairly frequently, and the changes in constitutional order that should accompany such rebellions—or the mere passage of a 19 year generation. I argue that had Madison and Jefferson truly understood each other, they would have come to a middle ground. Both men are somewhat open to a middle road, between Madison's focus on dialogic communities supporting the government and Jefferson's understanding of the need people have for constitutions (even if they do change with relative frequency). I then suggest that together they could have come to a position of critical veneration, or at the very least, we should come to that position by studying each man's political theory.

Chapter 2 of the first Part presents aspirational conflict in the context of critical veneration, and is, as such, the most important chapter of the dissertation. In order to

[37] Madison, *Federalist* 10

show what a critical venerator of the Constitution could actually look like, I use Frederick Douglass as an example. He was born into a system of what Mark Graber would call constitutional evil, but he found hope by interpreting the Constitution as an anti-slavery document. However, this evil system still needed to be replaced, so Douglass advocated slave rebellions that used violence. Once the Civil War was over, he ended his advocacy for violence and turned to writing to convince the public of his opinions about equality. This chapter, through introducing aspirational conflict, or the necessary violence needed to bring our aspirations into this world of constitutional evil, introduces a concept of Jack Balkin's: constitutional redemption. Constitutional redemption takes note of the evils maintained in the Constitution due to compromises that the founders made in order for the constitutional order to come into being, and attempts to ameliorate those situations. Balkin's constitutional redemption is a deeply aspirational system. In that respect, I identify as a Balkinian. But Balkin does not go far enough when he analyses constitutional systems—namely, he does not mention the violence that accompanies the creation and maintenance of those systems. Mark Graber's awareness of this violence, in fact, is what leads him away from an aspirationalist position. My concession to Graber's theory is aspirational conflict theory, which aims to use as little violence as necessary to accomplish aspirational goals. Finally, it is important to note that there are two types of violence described in this chapter: physical violence and aspirational violence. Here I return to Frederick Douglass and note that he only supported physical violence to end slavery, but was a proponent of what Robert Cover and Beau Breslin call metaphorical violence. Metaphorical violence is violence done by stopping some law or legal system from its normal operation, which does violence to those who benefited from that system. Thus, most of the violence condoned by the system of aspirational conflict is

metaphorical violence that comes out of realizing some aspirations of some groups of people over others (for example, favoring blacks over Jim Crow whites).

The second Part focuses on illegalities created by the evolution of a system of critical veneration combined with aspirational conflict. In Chapter 3, I show Madison and Jefferson's agreement on the importance of illegal acts to create and protect the Union. In the case of Madison, this involves a close textual analysis of *Federalist* 40 and the reasons it gives for abandoning the Articles of Confederation in favor of the Constitution. Madison concludes that popular approbation is the only recourse to make this transition legal, though it was still the right decision. Here we should note that the seeming difficulty Madison appeared to have with change in *Federalist* 49 is gone. He appears to argue that America is better off having no veneration for the Articles of Confederation. Moving to Jefferson's letters to Colvin, among others, we note that the same comfort with illegality is present. This is less surprising coming from Jefferson who supported rebellions in the documents used in Chapter 1.

In Chapter 4, I interrogate Bruce Ackerman's mode of constitutional interpretation and find it does not explain constitutional change through illegality as well as the work of Herbert Storing and Jeffrey Tulis. Ackerman argues that the American constitutional order is filled with breaks called constitutional moments (either 3 in his *We the People* volumes or potentially 8 in his Holmes lectures). These constitutional moments are unique opportunities for particular people in a particular time to engage with the constitutional order and change it in dramatic ways. Ackerman's main constitutional moments occur at the Founding, Reconstruction, and the New Deal. He argues that the Article V procedure set up for changing the system was ignored in favor of innovating according to the circumstances. In contrast to Ackerman, Storing, Tulis, and myself argue that American constitutional development, though it contains

illegalities from time to time, was not fundamentally broken at certain points, that the order is fundamentally of one piece. Furthermore, this piece was the one imagined by some of the founders—not in specifics of course—but in the major growth of the American political system and the eventual abolition of slavery.

The third Part concerns rights in the context of our aspirations. As in Chapter 1, we find Madison and Jefferson opposed on what the dangers are to government: too many enumerated rights or too few? Madison was concerned about the presence of too many enumerated rights in part because future generations will imagine that only those rights exist, but mainly because he saw too stringent rights provisions as ways for the government to usurp power where it was not supposed to encroach. By contrast, Jefferson envisioned the people being trampled by the government if they were not granted extensive rights protections.

Chapter 6 also focuses upon rights, though from a number of angles. Patriotism becomes a topic of study from the perspective of a debate between two Supreme Court Justices—Scalia and Breyer—over the use of foreign jurisprudence in our own jurisprudence. This is expanded to discuss constitutional patriotism. In accordance with the focus of this dissertation, constructive patriotism is preferable to blind patriotism. This rights talk is another way into our discussion of aspirations, because rights are the clearest formulations of our aspirations. It is also fairly easy to see when rights are not being fully extended to all people, which is the promise of our constitutional democracy. Finally, I discuss how we should talk about rights in order to incorporate responsibilities in our constitutional order.

The focus of this dissertation on critical veneration is clarified by having two sets of lenses—the founders' and our contemporaries'—because the former can illuminate why our constitutional order was created in certain ways and the latter can analyze

whether or not that order works. Ultimately, I aim to show how and why we should be critical venerators of the Constitution. With the background of critical veneration of the Constitution established in our minds, and, more importantly, in the minds of the citizenry, aspirational conflict is possible. I think it is even possible that a society of critical venerators could avoid physical violence and stick mainly to metaphorical violence. For this supposition to be explained, I use the example of Martin Luther King Jr. in the Conclusion to the dissertation. For King, physical violence was no longer necessary because the Civil War's violence of Frederick Douglass's time had already settled the biggest compromise in the American order: slavery was to be unconstitutional. As a result, King had a smaller—albeit very important—problem to deal with: Jim Crow. Physical violence was not even a justifiable means by King's time, as we can see from Malcolm X's less important movement. King's metaphorical violence towards Jim Crow in protests, sit-ins, and other social movement techniques was ultimately more valuable to his cause, and ultimately to making the government care about his cause, which, happily, ended with an extension of new civil and constitutional rights to African Americans.

Chapter 1: Veneration and Rebellion in James Madison and Thomas Jefferson's Thought

In thinking of tensions in constitutions, one might think that there must be an opposition between aspirations for what constitutionalism can create, and what veneration can solidify. That is, aspirations, which essentially move constitutions towards change and reform, would seem to be inherently in tension with veneration, which honors the constitution as it is and tends to resist change. This dichotomy appears—at least at first glance—to be alive and well in the relationship between Thomas Jefferson and James Madison. A typical view of the two goes as follows: Jefferson aspired; Madison stabilized. Jefferson dreamt of new generations recreating the world; Madison prayed for the work of the old to remain in place. Thus Jeffersonian constitutionalism was an effort to engage everyone in constitution making, while Madisonian constitutionalism was an effort to limit constitutional change.

In this dissertation I will challenge this view of a dichotomous Madison v. Jefferson story and instead tell a story about the project they both shared. To be sure, there are differences between the political philosophies of the two men. In this chapter we will read of Madison's exhortations towards stability of opinion and Jefferson's calls for new revolutions every 19 years. But in the background of this study should be the idea of critical veneration that allows Madison and Jefferson to join together in the middle. As we shall see, a sincere effort to learn from both of these American founders can and will lead us to a stance of critical veneration, rather than to understanding each of their ideas in a polarized way. Critical veneration requires a habit of mind that allows us to integrate faith and doubt together, and that is precisely the attitude we must adopt in order to form a constitutional stance that includes both Jefferson and Madison. Jefferson

held faith in the people to reinvent themselves through new constitutions, but had doubt that the constitutional orders that they would inaugurate could, would, or should survive. Madison, on the other hand, had doubt about the people's capacity to create new constitutions, but had faith that once under a constitutional order, those same people could sustain their governments. Thus, combining Madison and Jefferson can lead to critical veneration of government. Such veneration cannot be a blind acceptance of everything the government is and does or a blind fury against the government just because it is not of one's own making. Combining Madison and Jefferson can make for critical veneration of the people's capacity, whether it is always tethered to a government or not.

However, this is a scholarly view. If they had the benefit of thinking retrospectively about the Constitution from the viewpoint of the early twenty-first century, I think Madison and Jefferson would agree with me about taking a middle ground. I believe that Madison's statements in the 1790s about the abilities of the people to govern and be governed, as well as Jefferson's eventual acceptance of the Constitution, is good proof that both had the capacity to think deeply and to compromise, even if they saw the flaws in the compromises.

I am concerned in this dissertation with the scholarly project that creates this compromise, to be sure, but I am also well aware that the constitutional project as we live it exists only in real time, where people are less likely to compromise in the moment on theoretical issues, thinking instead of the deeply practical issues that all people must confront and making their compromises in the practical world. More so in the later chapters on Madison and Jefferson (3 and 5), we will examine what each though about political issues of the time, be they exigencies that confront the Union or rights provisions. But even here in this more theoretical chapter, we will be using materials

from public and private statements that show why it is important that we study these particular men in trying to understand critical veneration and aspirationalism.

For example, for Madison, stability is essential to the strength and longevity of government. This is not merely an academic statement: Madison uses his experiences in government during the 1780s to inform his judgment that the various rebellions that took place were truly dangerous to the American experiment under the Articles of Confederation. Later when he talks about public opinion, it is important to that discussion to know that Madison himself was an opinion-shaper, both in his *Federalist Papers* in the 1788-89 and in his *National Gazette* essays of 1791-92. Madison knew how public opinion was supposed to work and how it did actually work in practice. The same is true with ambition: the reason that Madisonian ambition should ultimately work is because it relies on a theory of political people as they will be, not as they should be. To create a theory that ambition will counter ambition, Madison had to rely on more than just theoretical knowledge—he needed to see how a real solution to men's ambition toppling governments would look like.

As for Jefferson, it seems initially in this chapter as if he focuses simply on ways to evade the government, both in revolutions and with rights provisions. But this too is a result of his practical political experience. Jefferson was writing from France as America's ambassador, and he had witnessed many revolts and difficulties with the government that were far greater than the small rebellions in America. Therefore, he was more inclined to protect the people from the government rather than to strengthen the government to educate the people in stability, public opinion, and eventually veneration. It is not that Jefferson couldn't see the value in those principles, but he was more worried about what a government might take away than what it could give.

Thus I hope to replicate, particularly in the conclusion to this chapter, the kind of debate that faith and doubt might have with each other. As I noted at the beginning of this chapter, Madison and Jefferson have faith and doubt in different aspects of governing. Without this combination of faith and doubt, it is unlikely that critical veneration would be possible. Thus, this chapter in particular will focus on Madisonian veneration first as an independent phenomenon, and then upon Jeffersonian rebellion as independent, before seeing both together in conversation. The conclusion will elaborate the scholarly view that allows me to extrapolate from their thought to show how both lend support to my theory of critical veneration.

MADISONIAN VENERATION

A combination of veneration with some aspect of change exists in Madison's writings. I will call this cautious veneration. It does not require fealty to forefathers, as Burkean veneration does. It should be contrasted with blind veneration, which Madison warns against in *Federalist* 14, where he rhetorically asks:

> Hearken not to the voice which petulantly tells you that the form of government recommended for your adoption is a novelty in the political world; that it has never yet had a place in the theories of the wildest projectors; that it rashly attempts what it is impossible to accomplish…But why is the experiment of an extended republic to be rejected merely because it is new? Is it not the glory of the people of America that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?"[38]

Here Madison praises the American people for resisting the temptation to blindly venerate the customs of the past without also considering the realities of the present. This

[38] Madison, *Federalist* 14, 99.

is not to say that Madison advocates radical change, of course, for he also honors America's attitude of due respect for "the opinions of former times." Because he advocates a basic respect for the past combined with an openness to the present and some view of the future, he is a proponent of cautious veneration. But he would not advocate what I call critical veneration.

The essential approach of critical veneration—attempting to reform a revered constitution based on one's own aspirations for it and for the nation—is too radical for Madison. In a Madisonian world the Constitution is revered: therefore we continue to abide by its strictures and it increases in our minds as an object worthy of reverence, as a time-honored carrier of tradition and American political values. Even in conflict, we affirm the Constitution: "For when people argue over the correct meaning of a constitution and refer back to it in political and social conflicts, they are basically affirming the constitution through these very conflicts."[39] In a way, cautious veneration means that we continue to fight new battles with the same tools that come with our veneration for our Constitution. For example, and this will be discussed in more depth later in this section, people are and have always been ambitious. In a system of cautious veneration, fights become about constitutional issues, perhaps even new constitutional issues that crop up, but the Constitution continues to be affirmed because the people in government fight on behalf of their particular positions and branches. Thus, as they argue over novel constitutional issues, they rebuild the structure of the government as it was meant to be seen: as an arena for political people who will continually confront politics in old and new forms.

[39] Grimm, "Keynote," 203.

Today we see an attitude of Madisonian cautious veneration in public political discourse. Americans argue about rights not through categorical human rights talk, but through Bill of Rights talk. Americans argue about government sometimes through the lens of a government of limited and enumerated powers. Americans argue over judicial philosophies on the Supreme Court by invoking fidelity to the Constitution. These arguments, much as they seem to embroil our nation in conflict, actually contribute both to a Madisonian cautious veneration and to constitutional stability by consistently going back to our founding texts and thinking carefully about what we inherit from them, using our "own good sense, the knowledge of [our] own situation, and the lessons of [our] own experience."

The stability required for cautious veneration is also preserved by the power of opinion.[40] Thus Robert Morgan writes "The stability of the republic cannot rest upon enlightened opinion alone; it requires a sentimental attachment as well." Such "affection" can only be "developed over time." Moreover, it "must be so widely shared as to be rooted in sentiment rather than pure reason alone. The strength of every individual's *opinions*, and '*its practical influence on his conduct,'* depends on both the number of persons one believes to have shared them and the long duration of time over which they have been held."[41]

However, stability, especially that which needs longstanding opinion to buttress it, cannot be the source of safety in government when a new government is just being established, as the United States was after abandoning the Articles of Confederation. Thus, in arguing for the importance of stability in the new system, Madison also had to

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[40] See Gibson, Alan. 2005. "Veneration and Vigilance: James Madison and Public Opinion, 1785-1800." *The Review of Politics*.

[41] Morgan, Robert. "Madison's Analysis of the Sources of Political Authority." *The American Political Science Review*. Vol 75, No. 3. Sept, 1981. 613-625, 616.

make room for a large element of novelty coming into play. These novel forms of government had to immediately help Americans form opinions of the Constitution. According to Colleen Sheehan, Madison's idea of public opinion works in four ways. It teaches the people how to govern and be governed. It creates a "standard of public conduct." It "express[es]…the opinion of the national majority, which can censor acts of the government. This censorship does not carry the force of law, but it may well 'lead to a change in the legislative expression' of the public will or even to a change in judicial opinion."[42] It protects rights to elections, representation, and political speech, among other things.

Now, it would seem that teaching the people to govern and be governed would take time, as would forming a national majority with the same opinion. But the people certainly knew enough from the start—especially as they had been partially socialized by the Articles of Confederation—to have the new Constitution fix standards of public conduct and protect basic political rights. These latter forms of opinion can help in the transition from the Articles to the Constitution.

Via these forms of opinion, Madison's worry that opinion takes too long to cultivate stability (and thus veneration) becomes less problematic. The new Constitution is generated by and generates opinion, so the American people can be more settled. Because opinion becomes settled through practice, veneration can develop first, and then from within that cautious veneration Americans usefully can critique the government. And finally, opinion can be a form of expression by the people. Thus Madison's model of cautious veneration based on popular opinion is viable even in moments of transition, at least if the transition is from a government with similar enough aspirations and values.

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[42] Sheehan, Colleen A. "Public Opinion and the Formation of Civic Character in Madison's Republican Theory." *The Review of Politics*. 67:1, Winter 2005, 37-48, 44.

Madison writes of two kinds of institutional stability: that of those elected for terms of office and that of the government itself. Constitutional forms that delineate the length of terms in office maintain the first kind of stability. The second type is more difficult to maintain, for it involves the minds and opinions of the American people. A stable constitutional government leads to veneration of that government according to Madison. Without veneration by the people of the United States the first type of stability—that of the constitutional structure—cannot exist. James Madison explains the role of veneration in *Federalist* 49 as he dismisses Jefferson's idea "'that whenever any two of the three branches of government shall concur in opinion, each by the voices of two thirds of their whole number, that a convention is necessary for altering the Constitution, or *correcting breaches of it*, a convention shall be called for the purpose.'"[43] This is unacceptable to Madison because it undermines the constitutional structure itself, and leaves open the possibility that greater changes in the aspirational character of the document are possible. After the proper encomium to his friend's talents and greatness of mind, Madison turns to voicing his strong opposition to this idea.

First, he opposes the conventions with a familiar complaint: the legislature is too strong and might be able to weaken the other branches, or at least two thirds of another branch to change the constitution to the legislature's will. This is problematic because the three branches are to be perfectly coordinate, not able to lord their increased power over the others.

His second complaint is central to our purpose in examining Madison's *Federalist* 49—namely that frequent appeals to change the government in form and structure will limit the veneration the people have for the constitutional order. As Madison argues,

[43] Madison, *Federalist* 49, 310.

governments rest on veneration and opinion, and both need strong support. For veneration to take hold in the minds of the people, one must either allow governments to receive the benefits of longevity, or there must be philosopher kings on a league with Plato's to convince the people of the goodness of the order. As he says in different words in *Federalist* 10, to expect these enlightened statesmen to be at the helm of government will not always work, for it takes a lot of work to find those people—if they even exist—and incorporate them into the government. Therefore the people must become convinced of the goodness of the constitutional order through the shared opinion of others, the longevity of the government, or both. Madison argues that for people generally, in order to make the good opinion of individuals about their government fight of their natural tendency towards timidity and cautiousness, the people must join in one opinion with many other men. And, of course, should long lasting veneration and numbers of men convinced combine, the government lies in even better stead: "When the examples which fortify opinion are *ancient* as well as *numerous*, they are known to have a double effect."[44]

Third, Madison worries about disrupting public tranquility with public passions ignited by new constitutional conventions and discussions. The formation of the American constitutional order, says Madison, was accompanied by a dangerous climate that created an unusual coherence of public opinion. The demands placed on Americans by the Revolutionary War ultimately united the people around the idea of a new governmental order. This political climate, Madison says, encouraged stifling "the passions most unfriendly to order and concord,"[45] led the people to follow true patriots as leaders, joined the people in similar opinions, and made them desire novelty in

[44] Madison, *Federalist* 49, 312.
[45] Madison, *Federalist* 49, 312.

governmental forms. As we cannot expect this danger to recur each time a constitutional convention would be called, we cannot expect the people to act in the reasonable way they did during this convention. The sentiments of the people this time were correct and salutary, but we cannot guarantee similar results for the future.

Fourth, and most importantly to Madison—though very similar to his first point against this measure, having branches levy power against each other is likely to lead to constitutional equilibrium. The branches are not made to be judges in their own cases against each other. They are meant to serve the people, and guard against each other's usurpations of power, as we will see more clearly in *Federalist* 51. Moreover, the people in this situation are likely to form parties for and against the attempted usurpation by the branches, and this leads to having the passions of the people, rather than their reason, judge the rightness of any cause.

In short, Madison has one main major concern about the possibility of new conventions: the role passions will play in creating new governments. Veneration would be harmed by passions taking away the stability of government by having repeated conventions. Stability, which supports veneration, would not be present if conventions were called too often. Either the three branches together or the legislature mainly (as the most powerful branch) might try to accrue more power to themselves than they were allowed in the Philadelphia Convention. The American system was designed to be stable and, if not passion-free—as that is impossible—free of the constant passion to innovate in government to serve one's own special interest. After all, Madison's main worry in *Federalist* 10—factions—are created by misdirected passions.

In addition to being passionate, Madison declares that all men are ambitious. Some have the right position to vent their ambitions through a political process, and some do not. The people who work inside the political process are required to harness their

ambition in service not only of the immediate polity and its ongoing fight against factional strife, but also in the service of being reelected for doing well. However, ambition can be handled in better and worse ways, as Randall Strahan notes, in *Federalist* 57, Madison writes: "The aim of every political constitution is, or ought to be, first to obtain for rulers men who posses the most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold the public trust." Strahan draws two conclusions from this passage: that Madisonian political science seeks to create political institutions that "evoke and reinforce the motivations" that propel "properly motivated officeholders" "to seek out and act on the public good."[46]

People who are ambitious without any outlet, whether it is the support of a candidate or seeking candidacy for themselves may have the tendency to create factions that tend towards ruining the constitutional order. Of course, it is also the case that people with strong interests who are unrepresented are also likely to create factions. If someone has strong opinions and ideas, and some are left unheard and unnoticed, her tendency towards faction might erupt. In *Federalist* 10, Madison uses the example of the conflict between the propertied and the property-less to demonstrate what factions might exist among people. The propertied are the minority and the property-less are the majority. Madison sees this conflict as a great temptation towards faction, as the majority could easily deprive the minority and take away their individual rights to own property. This faction then, unrestrained and acting against the will of the minority, likely would

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46 Strahan, Randall. "Personal Motives, Constitutional Forms, and the Public Good: Madison on Political Leadership" in Kernell, Samuel ed. *James Madison: The Theory and Practice of Republican Government*. Stanford: Stanford University Press, 2003, 79.

continue by upsetting other aspects of the constitutional order, perhaps even the mode of and candidates for election.

For the sake of preserving the constitutional order, then, American leaders must learn to balance ambition against ambition. This is important for two reasons. First, if the elected leaders of the country pay attention to potential factional disputes, then they are much more likely to be able to meliorate difficulties before they turn into factional strife. They may be able to compromise with the people instead of offending them, and the people may begin to see them as their people inside the government, as those who can help them from the inside. Second, and more importantly to Madison, ambition in public officials serves to keep the branches in check against each other, maintaining the correct constitutional balance through institutional battle. This competition is healthy because it keeps all of the branches in line. Branches of government could also slip into factional disputes, but if they are forced to fight on the level of constitutionalism both by their constituents and their ambitions to win, faction is less likely to sweep through the halls of government. What's more, Madison expects the people not only to depend on the government, but to help it as well: as Colleen Sheehan notes, "When the assertions in *Federalist 51* are attended to in the context of the two preceding *Federalist Papers*, a nascent idea beats in the ear of Publius' audience. It is reason, not passion, which ought to prevail over legislative decisions. Specifically, it is the reason *of the public* that ought to control the government."[47]

Madison tells us at what the new government aims: "Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty

[47] Sheehan, Colleen A. "Madison v. Hamilton: The Battle over Republicanism and the Role of Public Opinion." *The American Political Science Review*. 98:3, August 2004, 405-424, 416.

and the republican form."[48] These factors are supposed to create an environment suitable for preserving self-interest and the public good. It protects and promotes the public good while simultaneously allowing Americans the freedom to seek their own interests. It is easy to see why the founders would want to protect the public good, but why self interest? In *Federalist* 10 and 51, Madison saw the necessity of protecting self-interest partially because he saw no way to eliminate it without tyranny, and partially because the actions of members of government must be fueled by ambitious self-interest in order to make the government work well. And, if reason is to prevail, then the people must understand that the members of government pursue their self-interest and then force government officials to make their self-interest the same as the people's in order to be reelected.

Madison speaks directly to this issue in the early 1790s, when he writes, "'The people…ought to be enlightened, to be awakened, to be united, that after establishing a government they should watch over it, as well as obey it.'"[49] It is difficult to reconcile people that vigilant with the people who were to venerate the Constitution so deeply in the *Federalist*, unless we see that the Madisonian public cautiously—not blindly—venerates the Constitution. Their veneration is not blind because they watch over the government and take care to make the public officials' self-interest the same as their own self-interest. But it is indeed veneration, because we have seen how deeply Madison desired for the constitutional order to be preserved.

However, the above analysis also reveals that the Madisonian people never quite make it to critical veneration. Critical veneration is only possible by looking at the

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[48] Madison, *Federalist* 37, 222

[49] Gibson, Alan. 2005. "Veneration and Vigilance: James Madison and Public Opinion, 1785-1800." *The Review of Politics* 67 2005, 19.

Constitution more critically than even 1790s Madisonian veneration can produce. Most of all, it seems that Madisonian veneration contains some amount of group-think, as individual members of the political unit rely on each others' opinions in order to form their cautious veneration. By contrast, in practicing critical veneration, one must be prepared to be one alone in an opinion until one has convinced others of its rightness.

Nonetheless, it is essential to note that the Madisonian public has robust discussions and debates over the constitutional order. Then democratic legitimacy comes from being a part of what Bradley Kent Carter and Joseph F. Kobylka call "a dialogic community." This community exists "by building political and educational institutions, both formal and informal, that promoted a virtuous and politically conscious community of citizens and checked its excesses if it became temporarily corrupt [creating…] an active dialogic enterprise of self-governing citizens united by common allegiance to shared political truths."[50] This is useful to keep in mind as we turn to Jefferson, for despite being too anxious to create a new constitutional order, he does have more confidence in the people generally, and adds critical component of thinking in my scholarly combination of criticism and veneration.

JEFFERSONIAN REBELLIONS

In a letter to Madison, Jefferson condones turbulence as necessary to man's flourishing. He notes that he "would rather have a disturbed liberty than a quiet slavery" and that this turbulence actually has a good effect on government by keeping government close to the people who live under it. The government remains close because the people

[50] Carter, Bradley Kent and Joseph F Kobylka. "The Dialogic Community: Education, Leadership, and Participation in James Madison's Thought." *The Review of Politics*. 52:1 Winter 1990, 32-63, 33.

are naturally suspicious, and they pay "a general attention to public affairs." [51]As he states, "I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical. Unsuccessful rebellions indeed generally establish the incroachments on the rights of the people which have produced them."[52] He follows this by suggesting that governors of people be admonished not to punish the rebellious people too harshly, as rebellions are "medecine [sic] necessary for the sound health of government."[53]

What should we make of these sorts of rebellious statements? First, Jefferson sees rebellion as healthy and productive government. Even rebellions for rebellion's sake encourage the people to engage with government in a way that they would not without rebellions. Most importantly, for the most part, rebellions are rights protecting. The idea that rights would result from rebellions that happen rather often is, counterintuitive as it might seem, conducive to broad aspirations for a people. If people see that their governments are responsive to their rebellions, they can aspire to new rights and possibly even new forms of government. When new rights come with new rebellions, the people are able to advance their aspirational causes.

In a letter to Edward Carrington, Jefferson argues that "'the people are the only censors of their governors…and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty.'"[54] This is a rather odd statement when we consider that the English did establish certain rights for themselves, as did the French when Jefferson was living in Paris. So how can the people be the only safeguard of

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[51] Smith, James Morton. *The Republic of Letters*. New York: W. W. Norton & Company, 1995. 461.
[52] Smith, *The Republic of Letters*, 461.
[53] Smith, *The Republic of Letters*, 461.
[54] Malone, Dumas. *Jefferson and the Rights of Man*. Boston: Little, Brown and Company, 1951, 158.

public liberty? It would follow from Jefferson's earlier points if he means that the people's rebellions are the safeguard of liberty, and their rights the result of that liberty. Additionally, we should note that Jefferson writes of the "true principles of their institution," indicating, I would argue, that the government has aspirational purposes. Furthermore, as Peter Onuf states, "The citizen's participation in affairs of state was not an end itself for Jefferson but a means of curbing state power"[55]—the majority acting is not an end in itself. However, he was for political freedom, and argues, "a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."[56] Without a bill of rights, which was exactly the situation that Jefferson worried about with the new Constitution, we can assume that he would find rebellions even more necessary to the cause of freedom.

Jefferson noted to Abigail Adams "'The spirit of resistance to government is so valuable on certain occasions, that I wish it to be always kept alive. It will often be exercised when wrong, but better so than not to be exercised at all. I like a little rebellion now and then. It is like a storm in the atmosphere.'"[57] Thus resisting the government becomes not just a means to an end of rights, but also an exercise in learning how to think for their selves as a people. The fact that the people might be wrong in exercising their liberty should serve to them as a caution, but it should not extinguish the existence of rebellion. This will become especially important in the conclusion of this chapter, for this is the doubtful and rebellious part of critical veneration.

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[55] Onuf, Peter S. *The Mind of Thomas Jefferson*, Charlottesville: University of Virginia Press, 2007, 28.
[56] Smith, 513.
[57] Malone, *Jefferson*, 158.

The most famous Jeffersonian quotation to this end he made to W.S. Smith, wherein he states

> What country ever existed a century & a half without a rebellion? & what country can preserve it's [sic] liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance. Let them take arms. The remedy is to set them right as to facts, pardon & pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is it's [sic] natural manure.[58]

In attempting to justify these statements by Jefferson, his biographer Dumas Malone argues that his statement on the tree of liberty "is true enough…but what he was really emphasizing was the greater social peace of republican America than despotic Europe…[and] his philosophical justification of political revolution in the Declaration of Independence was far more sweeping than anything he was saying here."[59] This explanation would seem more justly made were it not that Jefferson seems to be saying in the passage preceding what is quoted that America has not had enough rebellions and needs to have more than one every century and a half. This seems especially true given Jefferson's statement within this quotation that "The remedy is to set them right as to facts, pardon & pacify them."[60] Such statements justify my argument that Jefferson means for rebellions to be teaching tools, certainly not of veneration as Madison would have argued, but of rebellion against unfit established orders.

MADISON AND JEFFERSON: VENERATION AND REBELLION

In Jefferson's famous letter to Madison of September 6, 1789, he rhetorically asks, "Whether one generation of men has a right to bind another,"[61] declaring as his

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[58] Malone, *Jefferson,* 165-66.
[59] Malone, *Jefferson,* 166.
[60] Malone, *Jefferson*, 166.
[61] Smith, *The Republic of Letters*, 631.

conclusion on the matter '*that the earth belongs in usufruct to the living.*'[62] His first foray into examining this principle occurs when he treats the ownership of land. Like Locke before him, he argues that all property rights are based on societal contracts and that natural right does not give one man land over another. He is also concerned for the rights of those who might go after him—namely his concern is that property rights established by one generation might be inherited to the next and that property rights thus would be forever unfair. Locke's famous dictum that man can take as much and as good as he can use for himself in the state of nature is taken further by Jefferson, as he is concerned not only with the proverbial stockpile of apples that one man might waste that others in his own generation could have consumed, but also for the wasting of resources that could be left to the next generation who could make good use of them.

Jefferson continued on this theme of generational change when applying the theories of a genealogical scientist of his day, Buffon. According to Buffon's calculations, Jefferson estimated the amount of time that men would need to form a generation and die off, and from there makes his assessment that "19. years is the term beyond which neither the representatives of a nation, nor even the whole nation itself assembled, can validly extend a debt."[63] Applying his majoritarian theories to the national debt, Jefferson argues that men cannot put future generations into debt without their consent, and as no consent can be gotten from people who are not yet born, no extension of debt in money can be countenanced. Society does not exist as a continuous organism for Jefferson, but rather as a discrete collection of persons still living who share particular views. He does not allow for majorities to make decisions for future majorities they might expect to follow them, and does not intend for the current majorities to be

[62] Smith, *The Republic of Letters*, 632.
[63] Smith, *The Republic of Letters*, 633.

bound by any decision that might have been made in the past. This independence he thinks to be a part of "the law of nature, that succeeding generations are not responsible for the preceding."[64]

Jefferson argued that the following constitutional conclusion followed from his arguments on the use of land and the national debt. He declares, "no society can make a perpetual constitution, or even a perpetual law…Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right."[65] This means that constitutional conventions, like the one that had been held in Philadelphia only two years before in his home country, could not create the stabilizing force that Madison had hoped. Without the continuity in government Madison so highly prized, stability, and thus veneration, becomes impossible

Jefferson worries in a letter[66] to Madison that having a power of repeal of constitutions is not enough. He far prefers the 19-year constitutional change prompted by Buffon's theories, where there could very well be a complete overhaul of the constitutional order every 19 years. Thus, instead of the people expecting their Constitution to last forever, they would expect that in their lifetimes they could become constitutional drafters. It would take the option being pre-built into the system, in Jefferson's opinion, for future generations to continually redo their predecessors' work. For a repeal to work the way its proponents would want it to, the people would have to be able to assemble themselves, to rid themselves of factions, and to rise above their personal interests to view the permanent interests of the community more broadly. This

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[64] Smith, *The Republic of Letters*, 634.
[65] Smith, *The Republic of Letters*, 634.
[66] Smith, *The Republic of Letters*, 631.

is far more optimistic about the people's capacities than Madison was in the first section, particularly on the subject of faction.

When James Madison replies to Jefferson's letter in February of 1790, he deems Jefferson's theories interesting but an altogether unworkable scheme of governance. Madison was a great fan of the security of governance produced by veneration, and here he makes that point against Jefferson's ideas. He also notes that the dead make improvements upon the land and the safety of the future inhabitants, so why should those future generations not be bound by those improvements in some way? The best example is that of war: if a nation goes into debt because of a war of self-defense, it is securing its lands for the future. However, if the nation is not allowed to secure those lands, for fear of raising a debt, there may not be a future country for the descendents of the potential patriotic warriors to inhabit. For that reason going into debt might be a "mutual good." As Madison states, "There seems to be a foundation in the nature of things, in the relation which one generation bears to another, for the *descent* of obligation from one to another."[67]

Madison finally questions whether this theory that undermines tacit consent might undermine the entire foundation of civil society. He declares that the "principle" on which "the voice of the majority bind[s] the minority" is based not on "the law of nature, but from compact founded on conveniency."[68] He notes that unanimity was required to begin any social compact, and that majoritarianism was a result of that compact, not of some right of nature that the majority has to bind the minority. Therefore, Jefferson's own principles of relying on the laws of nature would require unanimous consent every 19 years to form a new constitution, not majoritarian consent. This problem of principle

[67] Smith, *The Republic of Letters*, 651.
[68] Smith, *The Republic of Letters*, 652.

was, of course, also a problem for the Philadelphia Convention in moving from the unanimous consent rule to the 9/13 states consent rule for ratification, thus making Madison, the most important member of the Convention, very familiar with Jefferson's theoretical difficulty.

CONCLUSION

Theoretical difficulties of the sort just mentioned aside, this chapter has aimed to show how Madison and Jefferson understood the problem of constitutional change, particularly as regards veneration and rebellion. Madison hoped for a cautious veneration that allows Americans to be a part of active constitutional orders but not frequently changing those orders. Jefferson was more radical, hoping instead for frequent constitutional change, though not necessarily complete changes. He saw the people's constant interactions with the government in rebellions or in constitution drafting to be tools to keep the government as close to the people as possible. Madison was not categorically opposed to the people being involved in government, to be sure, but he is not as sure of the goodness of majority rule, as we can see from his discussion of faction in *Federalist* 10. For Madison, passions are necessary to life and politics. But they also can become nefarious if not checked by the best representatives a society can find—even if those representatives are not enlightened statesmen. Jefferson had more faith in the people and believed that they would not necessarily form factions.

Yet neither the historical Madison nor the historical Jefferson alone holds the key to being able to adapt constitutions to span the test of time. Madison is too cautious; Jefferson too rash. A combination of this caution and rashness would form what I term critical veneration if applied to constitutionalism, and would be an improvement on both.

Madisonian cautious veneration is important for the constitutional order because it provides the stability necessary for people to form reasonable opinions of their government, both in its positive and negative aspects. Cautious constitutional veneration allows for careful constitutional change, but aims to leave its aspirational content to future generations to hold. On the contrary, Jeffersonian rebelliousness causes people not just to discuss government amongst themselves, but also to actually interact with the government through rebellions that for the most part will not be very dangerous (though we must always think of the possibility of violence breaking out). Jeffersonian rebellion can provide none of the necessary veneration, but it can provide the habit of mind to go beyond a particular constitutional order to think about what kind of constitution suits Americans best.

In a world where Madison critically venerated the Constitution, for example, he would make more of the dialogic community among the citizenry so that they could better influence the ambitious office-holders. As Madison is not a believer in enlightened statesmen being at the helm of government—or at least not as a surety—he needs a counterbalance to individual politicians. Now, the checks and balances system, as well as ambition being joined to the interest of the place, are both good mechanisms. But both would be more effective if joined by a third consideration: the ability of the people to spot constitutionally problematic laws, or, more reasonably, their ability to elect those who will care about constitutionality and then monitor them. A dialogic community among citizens would allow them to do this in a more informed and effective way and thus allow them to participate in critical constitutional veneration.

Jefferson here is very different inasmuch as he does not venerate the Constitution. But might he venerate the Declaration of Independence (leaving aside his role in its creation)? He certainly values the principles that came out of the Declaration; perhaps

that is where his veneration lies. This was a question raised in the Introduction that now seems necessary to bring back, because it raises a more fundamental question: Are people able to venerate aspirations or must they only venerate the institutions that, one hopes, elicit from those principles? It is not enough, according to the argument being made here for critical veneration, to venerate principles. The veneration of principles is necessary but not sufficient. Principles are necessary to influence the procedural parts of government, but they cannot replace them; only through an institution with its concrete modes of operation can principles be put into action. To venerate a principle is also very complicated. Different people embrace different principles in varying ways, and as time changes principles may change as well—something which is unlikely to happen with the procedural pieces of the Constitution. If principles cannot be uniformly venerated, then they do not carry with them the stability that Madisonian veneration can provide, because they produce such different opinions in different people.

Thus I argue that Jeffersonian veneration of rights or aspirations is not enough; a nation needs Madisonian-like veneration in order to actually function in a constitutional order. Madisonian cautious veneration is incredibly important for stability and opinion as we noted before, but it is does not include the kind of revision of constitutional orders that grows out of the people's desire to make the Constitution better. In other words, it is only cautious veneration, and we are aiming for critical veneration. Jefferson's emphasis on rebellions for the rights they produce is essential to an order of critical veneration. Rights, after all, are the tools that critical venerators use to push the procedural pieces of the Constitution closer to constitutional goodness. Rights, which are often linked to aspirations, are necessary for constitutional redemption, as I noted in the Introduction, and as I will discuss in more detail in the Balkin section of Chapter 2.

Thus the principles, or rights, behind the constitutional order, including those included in the Declaration of Independence, should be seen as an important part of veneration but not the whole of it. The Constitution, which contains the seed of veneration, should be seen as a growing organism that needs self-conscious critique to survive and thrive. Although it would be problematic for the United States to undergo periodic constitutional revisions every 19 years, we as Americans should be reexamining how we apply our principles to our constitutional institutions far more often than that. As critical venerators of a constitutional document we should be using the carefully considered opinion that we and our fellow citizens hold in order to constantly make our Constitution better.

Chapter 2: The Case for Veneration Within a System of Aspirational Conflict

To combine veneration and rebellion seems impossible at first: how can anyone have deep respect and admiration for the constitutional order while wanting to change it in fundamental ways? This can only occur if people are willing to question the premises of their constitutional order without rejecting it outright. It is necessary to be able to take a step back from our Constitution and be able to imagine it as a better form of itself. At the same time, people must be able to see the good in the constitutional order. This approach can be explained in Jack Balkin's terms as practicing the mindset of constitutional redemption. To redeem a constitutional order means at once to believe in its merits and be attached to it (veneration) while realizing that the project must be carried far further (rebellion) in order to realize the best version of itself. This sort of rebellion is best defined as Jeffersonian rebellion because it focuses on the distance between our aspirations and what our Constitution actually says and does for us.

But how can anyone learn to venerate and rebel at once? Here, we can learn from Balkin's examples of William Lloyd Garrison and Frederick Douglass. Garrison revolted against the Constitution because he declared that the Constitution's pact with slavery made it 'a covenant with death and an agreement with hell.'[69] This seems like a reasonable position for someone simply opposed to the Constitution. However, what if a person's position is less clear—if perhaps it has the aspects of veneration and rebellion within it? Frederick Douglass at one time styled himself a Garrisonian, but upon further analysis of the situation of slavery and constitutional law, he decided that despite being a free black man discriminated against by Supreme Court decisions like *Dred Scott*,

[69] Balkin, *Constitutional Redemption*, 5.

"abolitionists should not treat the Constitution as incorrigible. Instead, he argued that the Constitution, rightly understood was not proslavery."[70] Now, of course Douglass took a leap of faith in order to hold this "optimistic" view. And, as Balkin notes here, this leap was not necessarily justified in Douglass's time or even ours: we are still making our way towards racial equality, among other kinds of equality.[71] But the main point is that Douglass was able to see the flaws in our Constitution and continue to venerate it enough to think it not incorrigible—that is, to imagine that it could be changed to right the wrongs of slavery.

Thus, Douglass is able to be a key figure for understanding veneration and rebellion as they mix together. To be sure, Douglass did not find the American system unflawed. To be sure, he wanted massive changes both in the constitutional structure and in the related structure of the society. But at the same time he advocated change, he continued to think within the framework of the Constitution. This is the way that veneration and rebellion can be combined.

Balkin labels this combination of seemingly disparate concepts residing together in one person or constitution as "nested opposition."[72] He defines nested opposition as a situation in "each" of the disparate concepts "incorporates the other and depends on the other"[73] despite being seeming opposites. It is under that paradigm of nested opposition between stasis, or veneration, and dynamism, or rebellion, that we shall examine Douglass's stance as well as Balkin's work.

The previous chapter's study of Madison and Jefferson leaves us with three types of veneration: blind veneration, which Madison despises, cautious veneration, which

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[70] Balkin, *Constitutional Redemption*, 47.
[71] Balkin, *Constitutional Redemption*, 47-48.
[72] Balkin, *Constitutional Redemption*, 96.
[73] Balkin, *Constitutional Redemption, 96.*

Madison espouses (though "cautious" is my explanatory term for how Madison describes veneration), and critical veneration, which is a middle ground between Madisonian veneration and Jeffersonian rebellion. Critical veneration is inspired by our aspirations as a polity to force ourselves to grow into the promises we have made to ourselves—or aspirations we make for ourselves—in the Preamble and the Declaration of Independence.

However, there is a difficulty with aspirationalism, or goal-oriented constitutionalism: it often leads to violence of various sorts. My two main interlocutors within this chapter, Jack Balkin and Mark Graber, represent two ways to deal with this problem. Balkin is an aspirationalist, albeit one who does not really deal with the problem of violence. Thus the type of aspirationalism that Balkin proposes is not fully an option, because constitutional violence, like the Civil War, is included in the aspirational model. Graber, on the other hand, spends so much time thinking about the dangers of violence that he opts for a non-aspirational approach to constitutional interpretation, preferring the safer status quo to the difficult redemptive project Balkin sets forth. In this chapter I will take Graber very seriously, but ultimately decide against his pessimistic approach for a more optimistic one, albeit an approach that is prepared for violence that grows out of conflicting aspirations.

In contrast to Mark Graber's criticism of aspirational approaches, my theory of aspirational conflict does not despair at the fact that there are many different sorts of aspirations in one polity: Fear of conflict should not prevent us from engaging with them in order to make ourselves better citizens, both of America and of the world community, and to make our Constitution a better one. Graber's response to this would be that this aspirational conflict process cannot lead to anything except incredibly damaging political effects—war, and especially civil war, among them. I agree with Graber that a principle-

based approach, or an aspirational approach, may lead to war and I agree, as would most sane people, that war is an evil we should avoid if possible. What I argue, however, is that it is necessary for a society to defend its key goals and principles, even when those principles conflict, and that war may be necessary when such conflicts occur. Or, in the case of recent wars for humanitarian intervention, it may be necessary for Americans to defend key goals and values around the world.

In order to reach this point in my argument, I will rely on first on my key example of an aspirationalist: Frederick Douglass. Then I will further flesh out my version of aspirational conflict theory, composed of constitutional veneration, aspirationalism, and redemption. This theory is in part inspired by the work of Balkin, especially in my use of his term redemption. I will argue much more strongly than Balkin that making the progression from veneration to aspiration to redemption will not only be conflictual, but also progressive.[74] My discussion of Balkin will make it clear that this aspirational conflict theory that encompasses the three terms and their progressive orientation is a serious alternative to Mark Graber's non-conflictual constitutional theory. I will also show aspirational conflict theory to be a necessary expansion of Jack Balkin's redemption theory, particularly when we consider the seemingly necessary result of some conflicts, like civil war.

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[74] Balkin also assumes that a chain of concepts like this will automatically lead to "progress" rather than some sort of originalist "return" to the beginning. I want to note that, although my analysis is progressive here, that it is possible to have aspirational conflict that leads to originalist commitments, and even that there are different forms of progressives in this debate.
See footnote 19 for Lincoln's view and a contrast with Ronald Dworkin's view voiced by Gary Jacobsohn.

A CASE STUDY OF AMERICAN REDEMPTIVE NARRATIVES: FREDERICK DOUGLASS

Frederick Douglass' earliest awakening to the fact that it was a "delusion that God requires [slaves] to submit to slavery, and to wear their chains with meekness and humility"[75] came when he was thirteen and reading *The Columbian Orator* for the first time. This was his first real attempt to read a book using the literacy he had obtained in bits and pieces first from his master's wife, and then from schoolchildren in his area of Baltimore. As he became literate and consciously no longer happy with his station as a slave Douglass himself thus came to agree with the master who had forbidden his wife to continue instructing Douglass in his letters: once he was educated, he would become no longer a pliant slave, unthinkingly accepting his servitude without question—even, as Douglass describes himself before his awakening, as a "light-hearted, gleesome boy" under slavery.[76] He sometimes regretted leaving the "stupid contentment" of his fellow slaves, because he became "too thoughtful to be happy…Once awakened by the sliver trump of knowledge, my spirit was roused to eternal wakefulness. Liberty! the inestimable birthright of every man, had, for me, converted every object into an asserter of this great right."[77]

Some while after he escaped slavery, Douglass met William Lloyd Garrison, an abolitionist in the North. He calls himself, "on the anti-slavery question, a faithful disciple of William Lloyd Garrison, and fully committed to his doctrine touching the pro-slavery character of the constitution of the United States, and the *non-voting principle*…With Mr. Garrison, I held it to be the first duty of the non-slaveholding states to dissolve the union with the slaveholding states…"[78] As a Garrisonian, Douglass

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[75] Douglass, Frederick. *Autobiographies*. New York: Library of America, 1994, 226.
[76] Douglass, *Autobiography*, 227.
[77] Douglass, *Autobiography*, 227.
[78] Douglass, *Autobiography*, 391.

believed that the Constitution must be seen as a proslavery document, and that no amount of political action could change that brute fact. However, his "gradual conversion to the idea that the Constitution could be a radical antislavery instrument serves as an interesting barometer of his espousal of political abolitionism." He moved from the Garrisonian position of seeing "the Constitution as a proslavery compact with evil. In a letter to Salmon Chase, Douglass declared himself 'satisfied that if strictly construed according to its reading' the Constitution was 'not a pro-slavery instrument,' although the 'original intent' of the founders and the meaning given it by the Supreme Court had made it so."[79]

Although he does not elaborate very much of the thinking behind his conversion in his autobiography "My Bondage and My Freedom," Douglass shows the reasons for his change of mind: he no longer thought that the North and South must be separated, no longer insisted upon the non-voting principle as a symbol of oppression and complicity with an evil regime, and came to believe "that the constitution of the United States not only contained no guarantees in favor of slavery, but, on the contrary, it is, in its letter and spirit, an anti-slavery instrument, demanding the abolition of slavery as a condition of its own existence, as the supreme law of the land."[80] Furthermore, Douglass made a study of the Constitution, particularly the Preamble, and concluded, "if the declared purposes of an instrument are to govern the meaning of all its parts and details, as they clearly should, the constitution of our country is our warrant for the abolition of slavery in every state in the American Union."[81]

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[79] Blight, David W. *Frederick Douglass' Civil War: Keeping Faith in Jubilee*. Baton Rouge: Louisiana State University Press, 1989, 32.
[80] Douglass, *Autobiography*, 392.
[81] Douglass, *Autobiography*, 393.

Douglass continued to evolve along this line of thought throughout the late 1840s. According to Philip S. Foner, "it required two years of study and discussion for Douglass to change his attitude toward the Constitution."[82] Eventually, by 1851, he

> declared that he too believed that the framers saw slavery as 'an expiring institution' and sought 'to make the Constitution a permanent liberty document. His reasoning came from an admixture of selective historical perception and moral outlook. Douglass always garnered hope from America's founding creeds, and in his view the Constitution—its republicanism and protection of individual rights—provided a legal foundation for the earlier promise in the Declaration of Independence. Without this promise and foundation, Douglass' vision of a future for blacks in America would have crumbled.[83]

In "The Meaning of July Fourth for the Negro" address of 1852, he not only states that the Constitution must not be a slave-holding document because it does not mention slaves or slave-holding, but he also encourages his listeners to think carefully about the Constitution. Douglass speaks of the men of the founding in glowing terms:

> They were peace men; but they preferred revolution to peaceful submission to bondage. They were quiet men; but they did not shrink from agitating against oppression. They showed forbearance; but that they knew its limits. They believed in order; but not in the order of tyranny. With them, nothing was 'settled' that was not right. With them, justice, liberty, and humanity were 'final'; not slavery and oppression. You may well cherish the memory of such men. They were great in their day and their generation. Their solid manhood stands out the more as we contrast it with these degenerate times.[84]

In order to correct these "degenerate times," therefore, he declares: "I hold that every American citizen has a right to form an opinion of the constitution, and to propagate that

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[82] Foner, Philip S. *The Life and Writings of Frederick Douglass: Volume II Pre-Civil War Decade 1850-1860*. New York: International Publishers, 1950, 52.

[83] Blight, *Frederick Douglass' Civil War*, 33. This position on Douglass' evolution seems more reasonable given what Douglass himself says in his autobiographies from the period. However, Foner does address a different possibility for why Douglass interpreted the Constitution as an anti-slavery document. As Foner explains, "As Douglass saw it, national necessity compelled him to accept an interpretation of the Constitution which might not be evident in the document." (Foner, *The Life and Writings of Frederick Douglass*, 53)

[84] Foner, *The Life and Writings of Frederick Douglass*, 186.

opinion, and to use all honorable means to make his opinion the prevailing one."[85] Furthermore, he cites "Ex-Vice-President Dallas" as saying that "the Constitution, in its words, is plain and intelligible, and is meant for the home-bred, unsophisticated understandings of our fellow citizens" and Senator Berrien who "tells us that the Constitution is the fundamental law, that which controls all others. The charter of our liberties, which every citizen has a personal interest in understanding thoroughly."[86]

Douglass shows himself to be an aspirational figure in his speeches, letters, and especially autobiographies: "Douglass wrote about his life, at least in part, as a public man, wishing to use his own example to the fullest possible good for his people. Inherently, his autobiographies were political acts."[87] These political ends make his work archetypal in the later work of Richard Wright, James Baldwin, and Malcolm X. It is important to note Robert F. Sayre's argument here, that Douglass' example and success as an autobiographer "shows why autobiography has been the major kind of literature for blacks and most other oppressed Americans. The person who can write one's own story can rise from the status of the unknown and inarticulate. He and she can thus relate story to others and to the stories of others."[88] As a former slave, Douglass' story is particularly inspirational, for his reading, not to mention his writing, was pursued against the regulations of the time. The ability to read and write, and especially to give names to the objects, persons, and ideas that surround us is particularly important. As Thomas Jefferson stated:

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[85] Foner, *The Life and Writings of Frederick Douglass*, 202.
[86] Foner, *The Life and Writings of Frederick Douglass*, 202.
[87] Blight, *Frederick Douglass' Civil War,* 27.
[88] Sayre, Robert F. "Autobiography and the Making of America." *The Iowa Review*. 9:2 Spring 1978, 1-19, 17.

> 'Certainly so great growing a population…spread over such an extent of country, with such a variety of arts, must enlarge their language to make it answer its purpose of expressing all ideas, the new as well as the old.'
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> Furthermore,
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> A transformation of status, such as the one all Americans experienced through the Revolution, required new names; as Jefferson saw it, 'The new circumstances in which we are placed call for new words, new phrases, and for the transfer of old words to new objects.'[89]

This transformation would be just as important in the transition after the Civil War in this Jeffersonian logic, for a large class of African Americans were transformed in status from slaves to freed people after the war.

The context of Douglass's writing as a critical venerator of the Constitution also must have been inspirational and persuasive to the black population of his time. His ability to write then was not just powerful as an example of a self-made black man in a nation that at once praised self-made men and ignored or punished the black population for attempting to live by that standard themselves. Douglass understood the historical significance of his own writing, and his existence through his writing. He knew that at once he was writing for the America he dreamed of and against the America that discriminated against him.

To make an address like "Fourth of July and the Negro" is meant by Douglass not only to show the problem with excluding the black man from the celebratory thoughts that go through the heads of white Americans who have the freedom to enjoy America, but also to show one example of what it means to rebel in thought through a re-creation of what memory of the past might mean to African Americans in the future. In this speech, he celebrates the youth of America as a country, for perhaps it is still "in the

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[89] MacKethan, Lucinda H. "From Fugitive Slave to Man of Letters: The Conversion of Frederick Douglass." *The Journal of Narrative Technique.* 16:1, Winter 1986, 55-71, 55.

impressible stage of her existence."[90] But he emphasizes that despite the respect he has for the founders and the youth of the country, that "we have to do with the past only as we can make it useful to the present and to the future"[91]—a past, present, and future that he calls "false" because of the distance from the ideals of America concerning slavery.[92] In this way, Douglass's aspirations for his country showed him how far America was in practice from living up to its own ideals.

However, he is also able to use American ideals to have his spirit "cheered by the obvious tendencies of the age," which he sees as moving inexorably toward progress, as "there are forces in operation which must inevitably work the downfall of slavery."[93] It is in moments like this that Douglass' aspirationalism shines through most clearly. When he writes of the future, he imagines resolution of the current disputes through an almost Hegelian movement of progress. David Blight describes Douglass' historical aspiration as follows:

> He deeply understood that peoples and nations are shaped and defined by history, which he knew was a primary source of identity, meaning, and motivation. He seemed acutely aware that history was both burden and inspiration, something to be both cherished and overcome. Douglass also understood that winning battles over policy or justice in the present often required an effective use of the past. He came to a realization that in the late nineteenth-century America blacks especially needed a usable past. 'It is not well to forget the past,' Douglass warned in an 1884 speech. 'Memory was given to man for some wise purpose. The past is…the mirror in which we may discern the dim outlines of the future and by which we may make them more symmetrical.'"[94]

Although the past may not contain good memories, memory is essential to a people to understand themselves in the present, against past history and the future. Having what

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[90] Foner, *Life and Writings of Frederick Douglass*, 183.
[91] Foner, *Life and Writings of Frederick Douglass*, 188.
[92] Foner, *Life and Writings of Frederick Douglass*, 190
[93] Foner, *Life and Writings of Frederick Douglass*, 203.
[94] Blight, *Frederick Douglass' Civil War*, 223.

Douglass called "a useable past"[95] allows, in his mind, for the possibility of redeeming the future. A useable past is also quite powerful in determining how aspirations should be developed and implemented.

However, Douglass did not stop at making speeches in his efforts to bring about change in the American system: he embraced violence against the old order. "As Douglass moved away from the Garrisonians in their support for non-violence, he was also moving away from their essential tenet—a revolutionary rejection of the American Constitution."[96] However, Douglass made what we might think of now as an unusual shift: "That is, Douglass moved from the position of a revolutionary who opposed violence to that of a reformer who favored violence."[97] What does it mean that he "favored violence?" By 1854 he was encouraging slave revolts and declaring that slaves were in the "state of nature" with their masters, and therefore slaves were required to defend themselves against their masters.[98] After the Civil War he stopped advising insurrections, as the state of war was over—at that point he advised that "they should turn to what was now *their* government and demand that *its* armed force be put to work in defense of their lives, limbs, liberties, and properties."[99] In doing so, it seems unlikely that Douglass was truly optimistic that peaceful means would work for blacks, that would allow them to demand government protection of their "lives, limbs, liberties, and properties." What we should note are his reflections on how persuasive the spoken and written word had been in ending slavery: "He recalled that the years of moral suasion had reached only the elite of society, but not the masses. The latter, he said, are guided not by

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[95] Blight, *Frederick Douglass' Civil War*, 223.
[96] Goldstein, Leslie Friedman. "Violence as an Instrument for Social Change: The Views of Frederick Douglass (1817-1895)." *The Journal of Negro History*, 61:1 1976, 62.
[97] Goldstein, "Violence as an Instrument," 62.
[98] Goldstein, "Violence as an Instrument," 66. 69.
[99] Goldstein, "Violence as an Instrument," 71.

'the voice of reason, but [by] the force of events. 'The American public…discovered and accepted more truth in our four years of war than they learned in forty years of peace.'"[100]

In the end, however, we should balance this statement against Leslie Goldstein's analysis of Douglass, that "He personally was a man of speech and pen, and he recognized the unquestionable significance in a republic of that target at which his weapons were aimed—public opinion." However, despite the fact that "He chose for his own contributions the weapons of moral persuasion, moral example, and political action…he welcomed to his army moral allies who could use those weapons of force which are a necessary part of political life."[101] In short, Douglass's aspirationalism led him to choose violent revolution when it was needed, but peaceful—yet persistent—agitation when it was not. Douglass strongly believed that the American system needed to be redeemed, and so to better understand what that redemption would look like, we move to Jack Balkin's work, some of which treats Douglass.

JACK BALKIN: CONSTITUTIONAL REDEMPTION, CONSTITUTIONAL JUSTICE

When Balkin speaks of Americans as being on a trajectory of constitutional redemption, he means redemption in a particular way. It is "not simply reform, but change that fulfills a promise of the past. Redemption does not mean discarding the existing Constitution and substituting a new one, but returning the Constitution we have to its correct path, pushing it closer to what we take to be its true nature, and discarding the dross of past moral compromise."[102] Balkin is an aspirationalist, which means that

[100] Goldstein, "Violence as an Instrument," 72.
[101] Goldstein, "Violence as an Instrument," 72.
[102] Balkin, *Constitutional Redemption*, 5-6.

this definition has certain content that is not immediately obvious. Returning the Constitution to its correct path means that we must put the Constitution on a trajectory towards whatever aspirations were promised in the Constitution. Though different people will interpret the goals of the Constitution in different ways, it is important to remember from the discussion of Madisonian cautious veneration that no people exist in a bubble of their own opinions. Constitutional interpretation, which is required to figure out what actually needs to be redeemed within a constitutional order, is a joint enterprise under critical veneration, because we all must live together under similar aspirations or face the terrible consequences inherent in conflict or even war.

But why does this require religious language, in words like "redemption?" First, religious beliefs and constitutional beliefs both have key texts for interpretation, so there are parallels there. His main point, however, in consciously using religious language, is that "We must have a way to talk about the commitments of a people in a creedal tradition spanning many years, involving the work of many generations, constantly subject to change and circumstances that are sometimes recognized and sometimes not, and organized around the maintenance and interpretation of an ancient creedal text."[103] This is primarily a religious way of seeing the world, and so Balkin adopts that language, without adopting the religious messages that certain words convey immediately to religious people. There is another religious parallel in what he says about the Constitution being revealed: "One might say that the meaning of the Constitution is revealed to us as we take upon ourselves the burden of redemption. But it is more correct to say that we reveal it to ourselves through our actions. Its meaning is not foreordained, meeting new and unexpected circumstances as they arise."[104]

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[103] Balkin, *Constitutional Redemption*, 7.
[104] Balkin, *Constitutional Redemption*, 29.

Taking the project, or "burden," of redemption upon ourselves links back to what was said about the constitutional interpretation and debate that must go on in order to understand our aspirations—both in Madisonian cautious veneration and in critical veneration. We act together to redeem a Constitution whose purposes are not always entirely clear to us. Change and progress "reveal" themselves differently over time. For example, Douglass would never have guessed that less than 200 years after the Civil War, we would have a black President. However, he probably also did not anticipate the despair of the Jim Crow era. Thus, he would have needed to—just like we need to—move to redeem the parts of the Constitution that appear most problematic to us, and not get too focused on past problems that have been fixed or future problems that are too far away yet for us to fix. We must be realistic critical venerators and work with the material of our Constitution and our aspirations for it.

This politics of redemption starts from a similar place as critical veneration because both see the problems in the present constitutional order and aim to fix them with an eye to our initial aspirations from when we came together as a people. Redeeming the Constitution then requires what Balkin calls constitutional faith, which he defines as "simultaneously faith in a text, an institution, and a people."[105] This faith consists of believing that the people can restore and improve upon the Constitution to redeem its promise. Faith is important at a foundational level for Balkin, for it is only by constitutional faith that we can support political systems that are flawed, believe that changes can be made in deeply problematic regimes, understand deviations from democracy in these regimes, and, most importantly, argue that progress is possible.[106]

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[105] Balkin, *Constitutional Redemption*, 8.
[106] Balkin, *Constitutional Redemption*, 49.

Balkin disavows what he calls the Great Progressive Narrative, which he defines as the story that "America began with a break from tyranny, established a free government under a wise Constitution, and ever since then has been getting better and better, more just and more free…the story of America is a story of progress: more rights for more people, more inclusion, more liberty, more justice for all."[107] However, particularly because he uses words like revelation to discuss working out the Constitution's bad parts into better parts, it is hard to distinguish his redemptive vision from what he entitles the Great Progressive Narrative. To be sure, he adds a caveat to his redemption theory—that "The story is contingent in another way as well. A narrative justification does not claim that the eventual redemption is assured. It claims only that we should strive to achieve it."[108] In other words, we may not be successful in redeeming the Constitution. But at the same time, the entire book ends up being devoted to the progress we have made, halting progress perhaps, but clearly the kind of progress the Great Progressive Narrative has in mind, more so than Balkin himself seems to have intended.

This is important to my argument because here I distance my redemptive argument from Balkin's. It is probably partially because he does not understand the role that violence might play that his account of redemption seems like such a smooth road. But here I want to emphasize how rocky that road necessarily must be. As I note in Chapter 1, Michael Kammen states: "Progress in history is rarely easy, however, and veneration has often become most intense as part of the process whereby controversies are resolved and issues resolved."[109] This makes for difficult circumstances to redeem

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[107] Balkin, *Constitutional Redemption*, 3.
[108] Balkin, *Constitutional Redemption*, 29-30.
[109] Kammen, *A Machine*, 38

any Constitution. Thus, when I discuss redemption in my own words, I mean for this extra difficulty to be attached to it. Balkin's term "redemption" is incredibly useful, but his analysis is, in places, unhelpfully sunny.

Balkin then shows readers how constitutional faith links to fidelity in the constitutional system, which we are interested in because it is an argument about how to interpret the Constitution using constitutional redemption. Although as the chapter progresses he uses the terms interchangeably, which makes interpretation more difficult, at the beginning it seems that faith is linked more to legitimacy and fidelity to doing interpretive justice to the text. Perhaps, as he previously defined constitutional faith as faith in "simultaneously faith in a text, an institution, and a people," fidelity can be seen as a subsection of faith. This seems like a just interpretation particularly because fidelity requires a particular habit of mind to preserve, or, in Balkin's words, fidelity "is not simply a property of an interpretation [but also…] a feature of a self who is socialized in a certain way and who disciplines him- or herself to think and argue in a certain way."[110] So the people who we have faith in are the people we are socialized to have faith in, and the same with institutions and text. We are faithful in a Balkinian sense in almost the same way we are naturally venerative in a Madisonian sense. This makes sense especially after Balkin declares that fidelity in constitutional interpretation "can actually skew and limit our understandings about justice, because not all claims are equally easy to state in the language of that tradition. We might call this phenomenon the stunting of political imagination."[111] If this is the case, then fidelity looks like blind veneration.

Both fidelity and blind veneration lead to the same sort of understandings of our political system. Balkin's three concerns about fidelity seem to apply equally well to

[110] Balkin, *Constitutional Redemption*, 103.
[111] Balkin, *Constitutional Redemption*, 104.

blind veneration: it makes us "see the Constitution as standing for whatever we believe is just, whether it does or not," it requires that "we conform our beliefs about justice to our sense of what the Constitution means, and not the other way around," and, as already noted, "the practice of constitutional interpretation can actually skew and limit our understandings about justice."[112]

What effect might complete fidelity to or blind veneration of the Constitution have? It might blind us to the greatest of dangers present in Balkin's work: ignoring constitutional evil and thus failing to redeem the constitutional order. At the same time, Balkin recognizes that some amount of fidelity is inevitably a part of our legal consciousness. In fact, as he states, "even when we criticize the Constitution, we are in some sense offering what we believe to be a faithful interpretation of it."[113] Thus we must learn to live with this fidelity and correct for it, particularly if we are to take an aspirationalist view of the Constitution. In such a view, we accept the reality of constitutional evil as a "basic condition of politics that must perpetually be overcome" through our efforts towards constitutional redemption."[114] Without this perpetual overcoming, constitutional evil, which "is the possibility that the Constitution, as it operates in practice, permits or even requires great injustices,"[115] might never be redeemed.

Balkinian constitutional theory makes use of Levinson's distinctions between constitutional Protestantism and Catholicism by combining them. He sees those modes of interpretation as intertwined in what he calls a "nested opposition."[116] A nested

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[112] Balkin, *Constitutional Redemption*, 104.
[113] Balkin, *Constitutional Redemption*, 106.
[114] Balkin, *Constitutional Redemption*, 120.
[115] Balkin, *Constitutional Redemption*, 7.
[116] Balkin, *Constitutional Redemption*, 96.

opposition takes two terms that are seemingly opposites and shows how they are inextricably linked. In the case of this particular nested opposition, the Protestant and Catholic ways of interpreting the Constitution are seen together rather than separately. This opposition can be seen only when the Constitution is viewed dynamically instead of statically.

The Catholic/Protestant dualism of the making of law leads Balkin to declare that "Changes in constitutional doctrine do not occur because judges randomly change their minds; they occur because people with particular constitutional views organize to promote those views, and, if successful, eventually influence the political culture, elected officials, and the sorts of people who are appointed to be judges and justices."[117] That is both a mode of constitutional Catholicism and Protestantism at once. It is Catholic because it assumes the primacy of the Supreme Court in making the actual legal decisions for the polity; it is Protestant because the battles over the issues take place at all levels of government and non-governmental associations. By contrast, constitutional Protestants, viewed as dissenters, are constantly trying to convince others, and ultimately, to convince those in power to give them the Catholic power to make the rules for the country from the bench.

In part because of his reliance on specific examples to explain concepts like constitutional Catholicism and Protestantism, Balkin becomes a legal historian as well as a legal theorist. This character of his work is best explained in a quotation about Frederick Douglass. Because of their focus on the problem of constitutional evil and what might elicit from it, no matter how constitutional law is interpreted, what Blight said of Douglass in the previous section is just as valid to apply first to Jack Balkin's

[117] Balkin, *Constitutional Redemption*, 96.

constitutional theory, and then in the next section to Mark Graber's very different constitutional theory:

> [Douglass] seemed acutely aware that history was both burden and inspiration, something to be both cherished and overcome. Douglass also understood that winning battles over policy or justice in the present often required an effective use of the past. 'The past is…the mirror in which we may discern the dim outlines of the future and by which we may make them more symmetrical.'[118]

The burden in Balkinian—and Graberian—terms is the presence of constitutional evil. They differ, however, in how to deal with this problem, as it is not merely an historical legacy. Constitutional evil continues, in forms less serious than slavery, but the Constitution has not yet been redeemed.

Balkin is an optimist who truly believes that redemption is possible and even a good course of action; Graber, as we will see, is at the very least a realist, if not a pessimist, about not charting a new theoretical course in constitutionalism, but rather relying on compromises hammered out long ago that allow us to live together. The section on Graber that follows next will show this divergence by first examining Graber's nemesis of sorts—Lincolnian constitutional theory—and then his proposals for a politics of compromise.

MARK GRABER: CONSTITUTIONAL EVIL, CONSTITUTIONAL PEACE

As Mark Graber writes, liberty is not the only organizing principle of American constitutional theory or development, even Lincolnian theory. From the Preamble we learn that we ought to "establish justice." Here Graber uses Lincoln to classify contemporary scholars and show how complicated principle-based constitutional theory can be just on the standard of justice:

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[118] Blight, *Frederick Douglass' Civil War*, 223.

> Lincoln's constitution commits Americans to work together for justice. The 'more perfect union' envisioned by the preamble is a good political order. 'The job of American constitutional theory,' Eisgruber declares, 'is to describe how Americans should conceive and inhabit their institutions so that they can govern themselves on the basis of their best judgments about justice.' Abraham Lincoln believed that Americans were constitutionally committed to the eventual abolition of slavery. Today Lincolnians insist the Constitution commits Americans to liberal egalitarianism [Ronald Dworkin], libertarianism [Randy Barnett], populism [Mark Tushnet], deliberative democracy [Cass Sunstein], or the rule of law [Antonin Scalia]."[119]

Although these theorists have different specific interpretations of what it would mean to live in a Lincolnian society, they all agree that our Constitution is a force for justice and for good. They would all side with Lincoln against John Bell, "stealth candidate in the 1860 presidential election," who supported constitutional peace rather than constitutional justice, the latter of which paths was Lincoln's.[120] Constitutional justice in this context should be associated with a principle-based approach, where justice according to principle is more important than stability of the regime. After all, the Lincolnian position did lead to war. On the other side, constitutional peace, which we will associate with Mark Graber's constitutional theory, encourages its supporters to preserve stability and peace above being as true as possible to principle. In Lincolnian theory, then, "constitutional theory helps limit and eventually eradicate constitutional evil"[121] because evil is unjust, even if the mechanism of eradicating that evil is war.

Thus Lincolnian constitutional theory, as described by Graber, is compatible with my theory of aspirational conflict, taking constitutional evils and using American aspirational principles to rectify them, by war, if necessary. War is one area that Balkin does not really touch upon in his description of constitutional redemption, probably

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[119] Graber, Mark A. Dred Scott *and the Problem of Constitutional Evil*. New York: Cambridge University Press, 2006, 243.
[120] Graber, Dred Scott, 241.
[121] Graber, Dred Scott, 246.

because there is a serious intellectual problem with solving these disputes by war (in addition of course to the moral objections to war): war may not always lead to the aspirational result that Balkin or I would want. This problem may be insoluble.

Mark Graber, however, in his anti-Lincolnian analysis,[122] makes it clear that not only do constitutions not settle this battle of competing visions of justice adequately, but that we would not want them to settle which competing vision of justice ought to win if they could. He notes, "constitutional theory is about how political regimes are maintained as well as how they are improved or perfected."[123] This statement is meant to emphasize maintenance over perfection, as we all know that perfection is impossible. He insists that having a political regime committed to perfection lessens the chance that ordinary citizens will be able to maintain it with any sort of peaceful settlement. As Graber states, "Constitutionalism…mediates the controversies that arise among citizens who hold clashing political aspirations."[124] Graber elaborates: "The constitutional task is better described as finding settlements that everyone perceives as 'not bad enough' to justify secession and civil war than as making the Constitution 'the best that it can be' from some contestable normative perspective."[125] These "contestable normative perspective[s]" are the places from which progressive constitutional aspirationalism begins. Graber's non-aspirationalism is most obvious here, when he dismisses contestable normative perspectives.

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[122]According to Graber, "Lincoln abandoned the original constitutional hope that conflicts over slavery would not disrupt union. His claim that the persons responsible for the Constitution intended to place slavery 'in the course of ultimate extinction' was faulty constitutional history. Taney was more faithful to the original Constitution…" (Graber, Dred Scott, 13).

[123] Graber, Dred Scott, 248.

[124] Graber, Dred Scott, 2.

[125] Graber, Dred Scott, 2.

For Graber, constitutional evil appears when "the problem of when and whether citizens should accommodate more injustice than constitutionally necessary by providing protections for heinous practices [is] not clearly mandated by the constitutional text or history."[126] The definition of constitutionally necessary seems to be the way the injustices were settled in the beginning in the constitution-making process. That process was meant to provide stability and a large measure of constitutional peace. But we must ask ourselves how much the principles enshrined in the Constitution might matter when determining what "heinous practices" must be tolerated for stability and which, at some point in the constitutional life of the polity, appear far too heinous according to those principles to continue to be followed for the sake of constitutional peace. Graber's constitutionalism seems far more static than aspirationalist constitutionalist theories, as it only uses text and history to determine heinousness of crimes in constitutional law. Aspirations, in theories like Balkin's and mine, are what keep the Constitution fluid. Without aspirations, it is entirely possible to rely on original principles and pre-constitutional history to establish what sorts of practices are heinous.

Graber introduces his reasoning for going along with the constitutional peace theory by emphasizing the differences there are among members of a political community rather than the similarities.

> Constitutional evil, stupidity, and tragedy are consequences of human diversity. Citizens of heterogeneous polities secure their fundamental interests in part by cooperating with others [and…] the constitutional bargains they strike are deficient from perspectives offered by any coherent theory of justice.[127]

These deficiencies are truly problematic, even in Graber's theory, because they are more likely to lead to disruption in the carefully crafted constitutional peace.

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[126] Graber, Dred Scott, 3.
[127] Graber, Dred Scott, 250.

In an article about Balkin's work on redemption, Graber makes a distinction between rotten constitutional bargains and really rotten constitutional bargains, where the latter represents slavery. In that latter schematic,

> Really rotten constitutional bargains when A and B agree that B will be permitted to deny what A regards as some of C's fundamental rights if B makes other concessions to A. The Constitution of 1787 was a really rotten constitutional compromise. Many Americans who recognized that slavery was an inhuman practice nevertheless agreed to tolerate African-American slavery in order to secure the 'blessings' of union…[128]

To conspire to deprive one segment of the people this dramatically is among the worst things that can be done to that subset of people—or, in the case of the American Civil War, those people who were not acknowledged by the state as full people. This is an insoluble difficulty for Graberian constitutional theory. Thus, the problem of constitutional evil and constitutional democracy's inability to solve it seems to be at the root of Graber's skepticism about constitutionalism to deliver the best results, much less results aimed at justice that take many more lives than they save in service to a justice-oriented ideal.[129] Of course, Balkin and Douglass, if they were to compare our founding constitution with what we have today, would argue that we have alleviated a good deal of constitutional evil.

There is merit to Graber's argument. As ideally homogenous as we may imagine the founding generation to have been—though it certainly was not—we can no longer hold that view of America. It was somewhat ludicrous even in the founding era, when John Jay wrote *Federalist Paper* #2. At the same time, the more we aim as a society at principles of justice, even ones that are defined broadly to create a coalition able to effect change, we see that at some times, we succeed in making the American order more just.

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[128] Graber, "Redeeming and Living with Evil," 18.
[129] Graber, Dred Scott, 254.

This justice unfortunately often succeeds civil strife—say, the Civil War or to a much lesser extent the Civil Rights Movement—but even Balkin does not say that redemption is easy. And, if we return to Graber's citation of Christopher Eisgruber a few pages ago, we remember that Lincolnian Americans are not looking for a philosophically rigorous sort of justice, but rather a government based on 'their best judgments about justice.' This is not a semantic difference for a reason Graber himself gives in that passage: informed Americans (like Dworkin, Barnett, Tushnet, Sunstein, and Scalia) are able to argue about true justice in the Constitution without pistols or warplanes. At the same time, it would be naïve to assume that no wars will be fought over principles. We must, especially in a Lincolnian analysis, always remember that two percent of the American population was killed in the Civil War.

To hold such a view, we must, with Balkin, accept the reality of constitutional evil as a "basic condition of politics that must perpetually be overcome" through our efforts towards constitutional redemption.[130] Without this perpetual overcoming, constitutional evil, which "is the possibility that the Constitution, as it operates in practice, permits or even requires great injustices"[131] might never be redeemed.

FORCE, VIOLENCE AND CONTESTATION AS ACTS OF LAW

There are two types of violence pertinent to this dissertation. The first, physical violence, is familiar to everyone. It is the kind of violence that war is filled with, the kind of violence that Graber worries about in aspirationalist constitutional systems. This kind of force literally kills.

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[130] Balkin, *Constitutional Redemption*, 120.
[131] Balkin, *Constitutional Redemption*, 107.

However, there is another kind of violence that we do not think of so much, because it does not (usually) physically harm anyone. However, this sort of violence, termed metaphorical violence, is an important component of some understandings of law. One good definition is what Beau Breslin would call metaphorical violence, "that marks a paradigmatic shift in political identity. To put it simply: new constitutional orders destroy—or do violence to—old constitutional orders at the precise moment of constitutional adoption."[132] These shifts in constitutional identity that characterize the constant motion of an aspirationalist constitutional system kills old constitutional practices.

Why should we worry about this second sort of violence? If all it kills are individual laws, or at the most, legal systems, what sort of mourning would even be appropriate? Collapse of political systems happens rather frequently; in fact, Zachary Elkins, Tom Ginsburg, and James Melton have studied the length of constitutions around the world and come up with the figure that mean lifespan of a constitution is 19 years.[133] So in our American case, the death of the constitution would seem to have been a long time coming. What's more, if we are Balkinians, we probably could embrace the death of a constitutional system so that we can improve upon its replacement, so long as the aspirations remain basically the same for the new constitutional construct.

However, we should not be so cavalier about losing a constitution, because of all of the things that it kills in its dying wake. Jobs in the government are major casualties in this time and should be a subject of great worry in this eventuality of the death of a constitution. What we should worry about more, however, is the death of the aspirations

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[132] Breslin, Beau. *From Words to Worlds: Exploring Constitutional Functionality*. Baltimore: Johns Hopkins University Press, 2009, 36.

[133] Elkins, Zachary, Tom Ginsburg, and James Melton. *The Endurance of National Constitutions*. Cambridge: Cambridge University Press. 2009.

that make constitutions worthwhile. Who is to say that we will get the same aspirational content from a new set of framers? Will people necessarily think to put in suitably strict guarantees for freedom and equality, given that those people are so used to living with such guarantees that they think them inevitable and irrevocable? Worse than losing those values would be lose the bases for democratic liberal constitutionalism, most importantly the rule of law and the various provisions that go with having a non-arbitrary government.

Using this framework of metaphorical violence we can now understand Robert Cover's formulation of the violence involved in law:

> Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it…Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.
>
> But judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence. The range of violence they could command (but generally do not) measures the range of the peace and law they constitute.[134]

This definition should be aimed at physical and metaphorical violence: judges allow defendants to be killed along with legal ideals, sometimes even in the same case. One example of these things occurring in the same case occurs when the court actually sentences someone to death. Considering for a moment the international consensus that the death penalty is barbaric, we would kill the idea of adopting that ideal in America by killing someone by the mechanisms of the state.

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[134] Cover, Robert M. "*The Supreme Court, 1982 Term: Foreward:* Nomos *and Narrative*." 97 Harv. L. Rev. 4, November 1983, 53.

But just as many would argue that physical violence, or even war, is sometimes necessary, there are means to justify metaphorical violence, especially for aspirationalists. The theory of aspirational conflict using force even goes back to James Madison when he states in *Federalist* 51 that ambition must counter ambition. In that situation, someone wins and someone loses. And as those battles are ones in government, except in rare cases in America, it is metaphorical violence that is done. One law gets passed over another, or one action is taken over another, and the loser in these battles usually must give up the aspiration she had held previously. An even better example of how the government does violence is highlighted by our weak federal arrangement in America. The supremacy clause of the Constitution kills state laws that are contrary to federal law, thus limiting the choices of the states and the people who administer and live within those states.

This metaphorical violence also can be understood as the driving force the founders utilized in moving America from life under the Articles of Confederation to the Constitution. This may seem to be the wrong moment in American history to identify violence—after all, there was a quite violent revolution for American independence that predates either constitution of the United States. But that is not the metaphorical violence we are attempting to identify, unless we mean the shift between the Articles of Confederation and the Constitution. What remains to be seen is how the new laws created after this violence can form an identity that remains constant to preserve critical veneration.

We also must ask ourselves how correct Weber might be in having only the state possess a monopoly on the means of violence, especially if violence is a broader term

than Weber recognized.[135] Which state has that power in the middle of a revolution, like that physical one of 1775 or constitutional one of 1787—the state under siege or the state attempting to become the new standard? In the cases I name, the rebels are the actors of the violence we would like to think legitimate today. And, it is only when problems at the level of revolutions are solved that Cover's judges matter at all.

Furthermore, who decides what violence is justified? The officials of the old order? Those of the new one? Or, as James Madison determined the viability of the 1787 Constitution, is the ratification of the people, the popular approbation for the violence they have suffered—in whatever means necessary—the true judge of violence? This issue becomes even more complicated when we move from the Revolutionary War to the Civil War, when the people certainly are a difficult arbiter, with about half of "we the people" on each side.

To put it differently, is the violence of critical veneration more acceptable than the non-violence of the sometimes-heinous status quo? In short, is a Balkinian analysis plus violence the way to go, or the Graberian notion of peace more acceptable? This dissertation argues in favor of understanding politics in a violence-conscious—and occasionally a physical violence-supporting, often a metaphorical violence-supporting—way. The Civil War was simply worth it because it led to redemption of our aspiration for liberty for a large segment of our population. The American Constitution was also simply worth it, as the Articles of Confederation were woefully inadequate to govern the kind of polity the founders were attempting to establish and did not contain the necessary aspirational principles to be adequate for the American people.

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[135] "Today…we have to say that a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory." Weber, Max. *From Max Weber: Essays in Sociology*. trans and ed. by H.H. Gerth and C. Wright Mills. New York: Oxford University Press, 1946, 78.

But do aspirations justify violent force? The last paragraph condones violence, but it does not justify it, except according to our aspirations. But this does not justify force; it merely explains why aspirationalists favor change. Unfortunately, the best justification for force is that it is necessary to promote difficult changes, because both political systems and individual persons generally resist change, and as Michael Kammen suggests, people tend to resist change even more the more they see changes in their political order coming. It is at that point that those who advocate changing the system to support our greatest aspirations must work hardest to convince other people that these sorts of changes are worthwhile.

To take the example of constitutional amendments, we should note that in the case of what we now call the Bill of Rights, the framers of the Constitution who were opposed to the amendments were forced to promise to add them as a condition of ratifying the Constitution. Even more force was used with the Reconstruction amendments: the South was literally forced into adopting those amendments as a condition of rejoining the Union. As Jon Elster reminds us

> When Ulysses bound himself to the mast and had his rowers put wax in their ears, it was to make it *impossible* for him to succumb to the song of the Sirens. Constitutions are usually designed to make it *difficult* to change their provisions, compared to ordinary legislation, but not impossible…extraconstitutional action always remains possible.[136]

Why would constitutions be designed to limit their change? It would seem that this must be done for a Graberian reason: once compromises are struck, it is safer for a constitution not to try to change its provisions for fear of losing the consent of the polity. American constitutional law is nearly Ulyssean constitutional law. Our Constitution is the hardest to amend in the world.

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[136] Elster, Jon. Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints. New York: Cambridge University Press, 2000, 94.

Over the span of our constitutional project, there have been areas of our constitutional order that needed fixing, but like Ulysses' binding, were almost impossible to remove from our order—namely, slavery. In this analogy, Lincoln is a rogue rower, and he brought with him what Karl Loewenstein would later call militant democracy.[137] As Loewenstein warned, one of the greatest dangers to democracy was its inability to use the right methodology to defeat fascism in Europe. Perhaps surprisingly to us now, Loewenstein recommends fascism as a technique for democracies to employ:[138] concluding, "democracy has to be redefined. It should be…the application of disciplined authority, by liberal minded men, for the ultimate ends of liberal government: human dignity and freedom."[139] In Loewenstein's model, that means that democracy must appropriate certain methods of fascism in order to sustain itself, particularly the emotional bonds fascism can bring and the ways in which fascist orders—as opposed to democracies—protect themselves from interlopers. Now, Loewenstein only uses European examples to discuss this need for fascism, and he certainly writes in a different

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[137] Loewenstein, Karl. "Militant Democracy and Fundamental Rights I." *The American Political Science Review*. 31(3) 1937, 417-32, 423-24.

[138] Lowenstein, Militant Democracy I, 422-24. On the other hand, if fascism is not a spiritual flame shooting across the borders, it is obviously only a technique for gaining and holding power, for the sake of power alone, without that metaphysical justification which can be derived from absolute values only. If this hypothesis is realized, the answer is equally inescapable. If democracy is convinced that it has not yet fulfilled its destination, it must fight on its own plane a technique which serves only the purpose of power. Democracy must become militant. Fascism is not an Ideology but a Political Technique… Fascism is not a philosophy-not even a realistic constructive program- but the most effective political technique in modern history…Fascism simply wants to rule. The vagueness of the fascist offerings hardens into concrete invective only if manifest deficiencies of the democratic system are singled out for attack.
Leadership, order, and discipline are set over against parliamentary corruption, chaos, and selfishness which the wire-pullers direct it. Fascism is the true child of the age of technical wonders and of the emotional masses…Its success is based on its perfect adjustment to democracy. Democracy and democratic tolerance have been used for their own destruction. Under cover of fundamental rights and the rule of law, the anti-democratic machine could be built up and set in motion legally… Democracy was unable to forbid the enemies of its very existence the use of democratic instrumentalities…To fascism in the guise of a legally recognized political party were accorded all the opportunities of democratic institutions.
The main principle of democracy is the notion of legality. Fascism therefore officially annexed legality."

[139] Loewenstein, Karl. "Militant Democracy and Fundamental Rights II." *The American Political Science Review*. 37(4) 638-58, 657-58.

context: the year 1937 in Europe. But his basic point is correct. Sometimes "the application of disciplined authority" to protect democracy does not mean that that authority will be democratic, just as the desire to create a good peace may require a terrible war first. This describes the way Lincoln operated opposed to law during the Civil War to create a better country without slavery. Replicating the emotional bonds that Loewenstein does not think are characteristic of a democratic order is also important for veneration, because they are very similar emotions. If you ask a random person why they venerate the Constitution, they are unlikely to be able to tell you exactly why they are attached to the Constitution except in terms of broad aspirations like "freedom" or "justice." They are unlikely to deconstruct the Congress and the reasons that they approve of its specific structures.

But we have not yet solved the problem of the justification of violence. Graber would most certainly ask the following question at the end of this section: what if the Civil War had not been successful in redeeming the aspirations Lincoln had for the Union, much less Frederick Douglass, whose life was more directly wrapped up in the crisis of the Civil War? In other words, what if the redemptive project fails? Redemption may be a project of sifting through traditions, saving some and condemning others, but if the "wrong" ones are saved then there is a serious problem with redemptive projects. As the failure of the Civil War is a counter-factual, I will only offer my opinion on what should have happened next. First, no one ever said that redemption would be easy. If the South had won the war, slavery may have lasted longer, but from the examples of slaves around the world, it seems that liberty tends to expand and leave slavery behind. As I will argue in Chapter 6, there are two scales of constitutional goodness: what rights are protected and to how many people are those rights extended? So long as the aspirations did not die in the Civil War, I am confident that there would

have been another moment to abolish the evil institution of slavery. After all, veneration for the Union in many people's minds was joined inextricably with freedom for all, not just white men. This veneration just had to hit a tipping point between discussing problems and actually putting one's life on the line to make the Union something that was moving closer to being redeemed.

SOME FINAL NOTES ON THE POTENTIAL USEFULNESS OF A THEORY OF ASPIRATIONAL CONFLICT

Redemption and aspirationalism take a great deal of work. First, people must see themselves and their lives as a part of a bigger project. But, as Alexis de Tocqueville suggested, Americans tend towards individualism and not thinking beyond their immediate families, neighbors, and friends as democracy spreads. This is not a good breeding ground for aspirational progressive change. Second, people must be willing to participate in government due to a shared vision of change. These days it is difficult to imagine a large group of Americans seeing anything beyond sheer party politics, which does not make for the kind of contemplation and critical veneration leading to mobilization that redemption requires. Third, everyone, including public officials, must be able to look beyond the status quo. That is exceptionally difficult even for the most committed political aficionados, much less a general public that is far less engaged. Fourth, the officials who gained their power through the status quo that portrays them as the main deciders of constitutional policy would have to give away that power to the demos. Without the people, neither redemption nor aspirationalism will work because there will be no changes in social and cultural views, in addition to the political changes that we have already identified. Fifth, both redemption and aspirationalism—especially as they are articulated by Balkin—require a large portion of stability in government to

accompany their change-making elements. Without this stability, as emphasized in Chapter 1, critical veneration is impossible.

Balkin's democratic legitimacy explains what must be another aspect of critical veneration: the people must "be able to subject their system of government to democratic processes of deliberation, protest, and critique."[140] This is different than the dialogic community proposed by Madison in his cautious veneration because it includes the aspect of critical protest. Madisonian cautious veneration requires that people stay within their governments; Balkinian democratic legitimacy goes an extra step. Thus fundamentally, we decide through our "*democratic culture*" how to create and recreate our society. As our Constitution is incredibly difficult to amend, citizen participation takes other routes—namely that of political parties and social movements. Balkin takes these avenues as enough to make the people feel involved, that "people feel that they have the right to assert their own views about the Constitution's meaning, and the fact that the political system regularly manifests dissensus and disagreement about important constitutional questions are not defects of the system; they are features of the system that help it both evolve and achieve democratic legitimacy over time."[141]

Therefore, the people should be able to feel at once that their current government is not legitimate in the best democratic way, but that they themselves can change it. As Robert Post and Reva Siegel put it,

> The premise of democratic constitutionalism is that the authority of the Constitution depends on its democratic legitimacy, upon the Constitution's ability to inspire Americans to recognize it as *their* Constitution. This belief is sustained by traditions of popular engagement that authorize citizens to make claims about the Constitution's meaning and to oppose their government—through constitutional lawmaking, electoral politics, and the institutions of civil society---

[140] Balkin, *Constitutional Redemption*, 63.
[141] Balkin, *Constitutional Redemption*, 70-71.

> when they believe that it is not respecting the Constitution. Government officials, in turn, both resist and respond to these citizen claims. These complex patterns of exchange have historically shaped the meaning of our Constitution."[142]

This arrangement would likely be very attractive to Frederick Douglass: but would it be possible? Douglass thought it possible after slavery had ended; for he moved from justifying slave rebellions to writing in order to change public opinion. Violence was also not the strategy employed later by the Civil Rights Movement led by Dr. Martin Luther King Jr. However if the end to having a very bloody war is simply to keep the Union together—not really to abolish slavery, even if that is what happened and that is how abolitionists saw the nature of the Civil War—we must ask: What is so great about keeping the Union together?

There are many arguments for Union, from somewhat thin conceptions of a security-focused state to thicker conceptions of states granting and protecting rights to the thickest conceptions of deliberative democratic states. I believe all of these arguments obtain here. The first, security-based argument is instrumentally true: the North is more likely to be safe with a South that is a component part of the Union. The second, rights-bearing argument, is valuable insofar as my theory of aspirational conflict obtains. Rights-oriented regimes require the kind of principled arguments that must exist for leaders like Lincoln to elevate liberty, or for preambles or bills of rights to extol the rule of justice over our joint lives together. The third, deliberative democracy argument is wrapped up in Balkin's conception of democratic legitimacy than stems from a full version of a Madisonian-type critical veneration. All three of these levels of argument for the Union's continued presence rely on a scary proposition ultimately: people must

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[142] Post, Robert and Reva Siegel. "Roe Rage: Democratic Constitutionalism and Backlash." *43 Harv. C.R.-C.L.L L.Rev 373*, 374.

also be willing to die and to kill for this Union on the basis of their veneration. Douglass was willing—are we?

Chapter 3: Illegality for James Madison and Thomas Jefferson

Aspirational conflict can prompt illegal acts. Illegalities committed in the name of aspirations often later seem less problematic than illegalities committed for some other end. Early in the American republic, one need only think of Thomas Jefferson's Declaration of Independence against the rightful government of the colonies, of General Washington's war against that government, and of Jefferson's Louisiana Purchase to understand how illegalities formed some of the most important political events of the late 18th and early 19th centuries. However, it is not the case that any illegal act is justified on any basis whatsoever. Madison and Jefferson aim at a particularly interesting and creative definition of law for both the rulers and the ruled. But neither seems to think that his excursion into illegalities should invalidate what they declare to be unchanging principles. To be sure, Jefferson wants the Declaration of Independence to change American society, just as Madison wants the new Constitution to radically alter the American world once ruled by the Articles of Confederation. But the fundamental American principles remain the same through these changes. The final American authority also remains in charge—the people.

JAMES MADISON: *FEDERALIST* 40, OR, VENERATING THE ARTICLES OF CONFEDERATION?

Federalist 40's stated purpose was to see "whether the convention [was] authorized to frame and propose this mixed Constitution."[143] Madison cites both the decision at the Annapolis Convention to have a future convention and the Congressional decision to have another convention. His analysis is less than straightforward, however,

[143] Madison, *Federalist* 40, 243.

inasmuch as he announces that these decisions mean that a strong national government was called for—no such language exists in the passages he quotes. But when he returns to the text, we should focus particularly on the language about exigencies that does appear in both of the quoted texts. As Madison rephrases it—this time with less emphasis on the "firm[ness]" necessary for the national government—"they were to frame a *national government*, adequate to the *exigencies of government* and *of the Union*; and to reduce the articles of Confederation into such form as to accomplish these purposes."[144]

We should first note that nowhere in either quotation of the original language by Madison at the beginning of *Federalist* 40 can we find language about reducing the Articles of Confederation. But more importantly, here Madison introduces both of the main themes of this *Federalist Paper*. *Federalist Paper* 40 apparently will address both the justification for the Philadelphia Convention itself and the exigencies that sometimes plague men, sometimes even drawing them into constitutional conventions. Now, if we stop reading at the end of the second page, wherein Madison declares that the Convention was charged with forming a national government, it is possible to imagine a reader not knowing why the rest of *Federalist* 40 was written. After all, if the instructions from the Annapolis Convention and the Congress were as definitive as Madison states in that paragraph, there is no reason to think that he would need to further justify the project. However, as 85 *Federalist Papers* were written to convince the people of New York that the Philadelphia Convention was an enterprise meant to serve their interests, it seems very unlikely that Madison really thought that a few paragraphs would suffice to justify

[144] Madison, *Federalist* 40, 244.

the entire endeavor being legal, particularly as others in the New York political arena were writing counter *Anti-Federalist Papers* to refute his, Hamilton, and Jay's claims.

So, it seems that Madison's two tasks will take a bit more time: he must justify the Constitution and the role that exigencies might play in what seem like present and future eras. The Constitution, it would seem, should be justified not according to extant law, but to the principles it is meant to serve. Yet immediately after stating the goals of the convention, he overtly introduces the principle of legality into the conversation. This seems like a bad idea if the people you are trying to convince believe that the Convention was not a proper exercise of law—particularly as it directly contravened the law of the land, the Articles of Confederation. But perhaps in the end it is a brilliant exercise—or rather, trick—for the casual reader; for in that next paragraph, Madison explains how important law and legality are to him. If the reader does not think carefully about whether that gels with everything else Madison writes in this *Paper*, he might think this is to be an argument that will be faithful to law: that is, after all, what Madison claims he is doing. As he writes:

> There are two rules of construction, dictated by plain reason as well as founded on legal axioms. The one is that every part of the expression ought, if possible, to allowed some meaning, and be made to conspire to some common end. The other is that where the several parts cannot be made to coincide, the less important parts should give way to the more important part; the means should be sacrificed to the end, rather than the end to the means.[145]

I am not sure what legal axioms Madison has in mind, as means-ends justifications of this sort sound more like political philosophy than legal theory. But this does not make this paragraph less interesting. Without reading ahead, the reader living under the Articles of Confederation might imagine that their improvement is the end. She would not be stupid

[145] Madison, *Federalist* 40, 244.

for imagining this, as that was the stated, legal purpose for calling the Philadelphia Convention.

If we continue reading, it becomes quite clear that preservation of the Union in the manner that Madison sees fit is the end, not the preservation of the legal order. Thus he uses the cloak of legal argument to make an argument for illegality—one that he will justify paragraphs later with the end of the people ratifying the Constitution justifying the means. Understanding the rhetoric of this *Federalist Paper*, however, runs on not skipping ahead to the end, so we should note that in this paragraph Madison changes the argument from legality to what is "of most importance to the people of America,"[146] whether "the Articles of Confederation should be disregarded, and an adequate government be provided, and the Union preserved; or that an adequate government should be omitted, and the Articles of Confederation preserved."[147] Happiness is not a negligible end, but it was not in the original terms of engagement that Madison presents. However, in a means/end calculation, it makes sense that our casual reader of the *Federalist* will prioritize the nation's happiness when it is not obvious that it is replacing legality.

In the next piece of the argument, Madison debates whether or not the changes to the Articles that the Convention was recommending could be reconciled with the original mandate to make changes to those Articles. In the end, he concludes that "The truth is that the great principles of the Constitution proposed by the convention may be considered less as absolutely new than as the expansion of principles which are found in the Articles of Confederation."[148] These principles are limited government and

[146] Madison, *Federalist* 40, 245.
[147] Madison, *Federalist* 40, 245.
[148] Madison, *Federalist* 40, 247.

independence and sovereignty for the states. As Madison took up the issue of national/federal government in *Federalist* 39, it is understandable that he does not want to wade into that issue again and moves forward with another argument about the conjunction between the Constitution and law. Here, Madison notes that there is a problem with the Constitution that people are largely ignoring when considering its legality—namely, that the amendment (and ratification) procedure for the new Constitution of 9/13 states differs substantially from the unanimity requirement contained in the Articles of Confederation. He only can defend the Constitution by saying that it is possible that the 13th state might be perverse, corrupt, or entirely inflexible. These are not legal arguments, of course, but Madison does not take them up any farther. Finally, Madison takes up the issue of crises, though yet again he begins in a counter-intuitive way. After spending several pages arguing that the Convention was acting legally, he reminds his readers that this presumption of legality has been merely a thought-experiment. Only the approbation of the people can actually make this legal. Thus we have the shift mentioned earlier where the end of a good government can justify the means of illegality. Here Madison turns around as the explicator of what the convention "must have thought," and we are thus asked to pretend—at least as readers today—that Madison was not the father of the Constitution, one of the key players in making this illegal Convention possible.

Going along with Madison's stance for the time being, we note that he indicates that the rest of what he will write in this *Paper* will be from a different perspective, probably from the perspective of citizens receiving "advisory and recommendatory" plans for a—greatly—revised constitutional structure.[149] The men of the Convention are

[149] Madison, *Federalist* 40, 248.

grand in stature in Madison's third person estimation, and used necessity to guide their actions. They also learned from the lessons of American and American state history, lessons that one can only learn from observing an actually functioning government, rather than theorizing about one that someday might be.

This discussion of necessity dovetails nicely into Madison's quotation of the Declaration of Independence. This piece of the paragraph is particularly rich:

> They must have reflected that in all great changes of established governments forms ought to give way to substance; that a rigid adherence in such cases to the former would render nominal and nugatory the transcendent and precious right of the people to '**abolish or alter their governments** as to them shall seem most likely to effect their safety and happiness…'[150]

First, what does it mean for "forms to give way to substance?" Basically it means that once again legal forms give way to the substantive necessities of the actual world. But even to get to those words skips ahead. First we must note that these enlightened citizens must have been intending to make a "great change" in the Articles of Confederation. This directly contradicts what Madison had said earlier in *Federalist* 40—namely that the principles of the two were similar enough that a massive change was not what readers should be contemplating. But here in his third person view, he notes the true revolutionary nature of the project he and his friends were contemplating in Philadelphia and scheming to get ratified in New York.

Next we ought to note that if Madison had been speaking in the language of law, then a "rigid adherence" to "forms" would be an excellent idea. This is just one more piece of evidence that he was not seriously focused—at least not in *Federalist* 40—on legality, or even, from time to time, the appearance of legality. But more shocking is the lawlessness in this sentence when combined with what comes next. If the law merely

[150] Madison, *Federalist* 40, 249.

restrains lawmakers from creating new constitutions, that is one thing. But to state that the law impedes citizens' natural rights to "abolish or alter" their governments might well mean that citizens can break the law. Madison is very quiet about this possibility, as we will see Jefferson is as well in the next section, but he broaches it nevertheless. To be sure, he follows this phrase saying that the people cannot truly change the government themselves in any organized way, but even the inclusion of that caveat is interesting, because it means that Madison probably contemplated that his words in the previous sentence might mean that the people could take matters into their own hands.

Finally, we should note again the presence of happiness as a standard rather than law as a standard. Moving to the next part of the paragraph, we read that

> …since it is impossible for the people spontaneously and universally to move in concert towards their object; and it is therefore essential that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable citizen or number of citizens...[151]

If we remain suspicious about whether or not citizens can disobey the law, this paragraph does not clarify matters entirely well. Who are the patriotic and respectable citizens? It seems unlikely that they are specially picked by the rest of the people, because it seems that Madison is saying that the great mass of the people will not be able to understand the means toward their end—the "object" mentioned in this passage. Yet again Madison dismisses legality as a standard by adopting "*informal and unauthorized provisions*," as those are two very clear ways of saying that their actions will not be legal, even if we would expect the "patriotic and respectable" citizen(s) to act in acceptable ways.

In fact, it would only make sense for the drafters of the work of the Philadelphia Convention to be these self-same patriots. But if that is true, then Madison once again tips his hand: if Philadelphia was the place for these patriotic men to act, then the means

[151] Madison, *Federalist* 40, 249

that they employed were informal and unauthorized at their core, or, in other words, their actions were illegal. This is a fairly accurate depiction of what we know of the actual Convention, but is obviously not what Madison should be saying about the Convention in a work designed to convince people that the framers were not renegade law-breakers bent on fundamentally changing the nature of the Union.

Madison then explains the things he imagines the patriot-framers will understand about their project, and gives a quick and loose summary of the existence of the Union, oddly making the existence of the states out to be "ancient." Yet again he scoffs at the law, stating that "nor could it be forgotten that no little ill-timed scruples, no zeal for adhering to ordinary forms, were anywhere seen"[152] except by those who truly did not support the project in the first place. But the most important remaining part of this paragraph, and indeed this essay, reads as follows: "They must have borne in mind that as the plan to be framed and proposed was to be submitted to *the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities."[153] Thus the people rectify the illegality and cleanse the document from any residual original sin. And finally, Madison returns us to the world where apparently the Convention was not a thought-experiment, but a reaction to incredibly dangerous political circumstances, and encourages ratification on the basis that one should take good advice offered by either an enemy or a friend.

Now that all of the instances of illegality have been laid out, it is worth considering what import this might have for the theory of veneration that we laid out in the first chapter of this dissertation. Can this be the same Madison, the same cautious man who thought stability was absolutely essential to law and thus to human flourishing

[152] Madison, *Federalist* 40, 249.
[153] Madison, *Federalist* 40, 249.

under a system of law that is constant and predictable? Not once in *Federalist* 40 does Madison mention stability. Stability would, however, be an excellent counterpoint to necessity forced by crisis that Madison champions in *Federalist* 40. Both, as we will see in the conclusion to this chapter, are useful to a theory of critical veneration that relies on aspirational conflict.

THOMAS JEFFERSON

Later in his life, Jefferson decided that the Declaration of Independence needed to be defended.[154] In a letter to Henry Lee of May 8, 1825, he writes "But with respect to our rights, and the acts of the British government contravening those rights, there was but one opinion on this side of the water…When forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. That was the object of the Declaration of Independence." He deems the principles laid out in the Declaration to be common sense, "'an expression of the American mind'" that did not aim "'to find out new principles, or new arguments, never before thought of, nor merely to say things which had never been said before, but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take.'" [155]

In his last letter, on June 24, 1826 to Roger C. Weightman, Jefferson replies to Weightman's invitation to celebrate the fiftieth anniversary of the Declaration with a

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[154] Library of Congress http://www.loc.gov/exhibits/jefferson/jeffleg.html> Accessed 27 May 2012.
[155] Jefferson, Thomas. "The Object of the Declaration of Independence." *Electronic Text Center, University of Virginia Library*. 1825 <http://etext.virginia.edu/etcbin/toccer-new2?id=JefLett.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=280&division=div1> Accessed 27 May 2012.

regretful decline, as he had fallen ill. In this letter he is far more expansive about the nature of the Declaration, writing:

> May it be to the world, what I believe it will be…the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self government. That form which we have submitted, restores the free right to the unbounded exercise of reason and freedom of opinion. All eyes are opened, or opening, to the rights of man…For ourselves, let the annual return of this day forever refresh our recollection of these rights, and an undiminished devotion to them.[156]

In both his letters on the Declaration to Lee and Weightman and his letter to John Colvin, Jefferson lays out similar themes to those found in *Federalist* 40, though far more overtly. Just as *Federalist* 40 justifies the illegal act of writing the new Constitution outside of the bounds of the Articles of Confederation with an appeal to principles rather than laws, so too do these three letters. In his letter to Colvin, he not only justifies lawlessness—he calls it "easy of solution in principle."[157] He phrases this solution without any of the doubts that one might expect when advocating lawlessness to "officers of high trust": "A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation."[158] To do this seems to fulfill Jefferson's description of the Declaration of Independence in his letter to Weightman, wherein he states that men should unbind themselves for the blessings of liberty and security in self-government.

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[156] Jefferson, "Last Letter: Apotheosis of Liberty," *Electronic Text Center, University of Virginia Library*. 1826. <http://etext.virginia.edu/etcbin/toccer-new2?id=JefLett.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=285&division=div1> Accessed 27 May 2012.
[157] Jefferson, Thomas. "Article 2, Section 3" *The Founders Constitution*.<< http://press-pubs.uchicago.edu/founders/documents/a2_3s8.html>> Accessed 28 May 2012.
[158] Jefferson, "Article 2, Section 3."

But what makes a constitutional system more secure when people break its laws? Jefferson justifies this in his next sentence, wherein he states "To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those enjoying them with us; thus absurdly sacrificing the end to the means."[159] This means/ends discussion was also in Madison's *Federalist* 40, and for much the same reason. But we must extrapolate how adherence to law harms law for Jefferson more than for Madison. For Madison in *Federalist* 40, adherence to the new law—the Constitution—is what trumps adherence to the old law—the Articles of Confederation. But to what higher law is Jefferson referring? It seems that principles are probably a greater source of law for Jefferson than actual written codes, as he states later in the letter: "the unwritten laws of necessity, of self-preservation, and of the public safety, control the written laws."[160]

Interestingly enough, however, in his example that follows the explication of his unwritten laws, he does not choose a situation he describes as being beset by extreme necessity or self-preservation. Rather, he justifies the hypothetical purchase of Florida on "the public advantage." We will examine this more closely with regards to the Louisiana Purchase next, but this example hardly proves his point here in this letter. His next example—that of Burr—is far closer to an example based on public safety, given the conspiracy he mentions. What is most interesting about this example is his first mention of this letter of judgment of the officer who acts contrary to or outside of the law: "The officer who is called to act on this superior ground, does indeed risk himself on the

[159] Jefferson, "Article 2, Section 3."
[160] Jefferson, "Article 2, Section 3."

justice of the controlling powers of the constitution, and his station makes it his duty to incur that risk."[161]

That particular risk of breaking the law—namely, the constitutional judgment—would seem to apply both to the officer of government who buys Florida and the one who saves us from a conspiracy. But Jefferson goes farther and declares "But those controlling powers, and his fellow citizens generally, are bound to judge according to the circumstances under which he acted…to put themselves into his situation."[162] Thus, in their minds, the citizens too go outside of the law. They must consider the officer not as a constitutional officer simply, but as a constitutional officer who has to make decisions that are outside of the Constitution in order to save it, or such is Jefferson's implication. He notes that he does not mean for these powers to be used in "trifling" circumstances, but "The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives."[163]

Now moving back in time from the letter to Colvin in 1810, we can compare how President Jefferson had dealt with these issues in a non-at-all theoretical way. Jefferson himself, in a letter to John C. Brekinridge in 1803, anticipated the possibility of needing to go before the public in order to justify the Louisiana Purchase. As he states preliminarily, "The treaty must of course be laid before both Houses, because both have important functions to exercise respecting it. They, I presume, will see their duty to their country in ratifying & paying for it, so as to secure a good which would otherwise

[161] Jefferson, "Article 2, Section 3."
[162] Jefferson, "Article 2, Section 3."
[163] Jefferson, "Article 2, Section 3."

probably be never again in their power."[164] This is benign enough and invites no specific constitutional questions. It is almost as if there are no special issues with this purchase. This assumption is belied by Jefferson's next sentence: "But I suppose they must then appeal to *the nation* for an additional article to the Constitution, approving and confirming an act which the nation had not previously authorized. The constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union."[165]

This is the precise reasoning that Madison uses to "blot out" the problems of adopting the Constitution in the first place. The people will make these actions constitutional by ratifying them post facto. Jefferson is confident that Congress will indeed ratify and pay for the Louisiana Territories, though it is odd that in that next part of the paragraph he does not again mention the people. We must wonder if it is enough to have the people's representatives ratify such a Union-changing development or if their duly elected representatives can act in their stead? This question is not answered in this letter. However, Jefferson does justify his own actions a bit more, framing himself as a guardian of a ward "in purchasing an important adjacent territory; & saying to him when of age, I did this for your good…I thought it my duty to risk myself for you."[166] But, again, an unanswered question: is the ward Congress or the people? It makes a difference, because American republicanism of the time, less so Jeffersonian republicanism than Madisonian republicanism, was not fully confident in the people's ability to make these sorts of decisions. But Jefferson is confident that "we shall not be

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[164] Jefferson, Thomas. "The Louisiana Purchase." <http://etext.virginia.edu/etcbin/ot2www-singleauthor?specfile=/web/data/jefferson/texts/jefall.o2w&act=text&offset=6224382&textreg=1&query=Louisiana> Accessed 28 May 2012.
[165] Jefferson, "The Louisiana Purchase."
[166] Jefferson, "The Louisiana Purchase."

disavowed by the nation, and their act of indemnity will confirm & not weaken the Constitution, by more strongly marking out its lines."[167]

Jefferson's tone changes quite a bit in another letter about the Louisiana Purchase, this time to Wilson Cary Nicholas. Rather than the Jefferson of the letter to John Colvin, who allowed breaking constitutional law in order to buy Florida, he declares in this letter that he wishes to keep strictly to the Constitution with precision. He does again state that the best way to deal with the Louisiana Purchase is by amendment, but Jefferson here has decided against what he calls "broad construction," a style of constitutional construction that seems far more germane to his previous opinions. This is particularly strange given a letter written only a few months later that frames the acquisition of Louisiana as a necessity and "as a great achievement to the mass of happiness which is to ensue."[168]

As Jefferson frames the argument in this letter, a war between France and England seemed to be the only way America would be able to make the purchase and be safe. But due to Napoleon's ability to "see the course predicted as necessary & unavoidable," "the *dénouement* has been happy."[169] What is most interesting about this letter is Jefferson's dismissal of the people's knowledge. Yet again in this letter, unlike the letter written to Nicholas, he seems to place himself in the place of an oracle who is able to see what is necessary to do before it happens, and therefore is able to influence events for the better. As Jefferson writes: "I very early saw that Louisiana was indeed a speck in our horizon which was to burst in a tornado; and the public are unapprized how near this catastrophe was. Nothing but a frank & friendly development of causes &

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[167] Jefferson, "The Louisiana Purchase."
[168] Jefferson, Thomas. "Jesus, Louisiana, and Malthus." *Electronic Text Center, University of Virginia Library*. <http://etext.virginia.edu/etcbin/toccer-new2?id=JefLett.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=158&division=div1> Accessed 28 May 2012.
[169] Jefferson, "Jesus, Louisiana, and Malthus."

effects on our part, and good sense enough in Bonaparte to see that the train was unavoidable, and would change the face of the world, saved us from that storm."[170] This storm seems to be in line with Jefferson's overall view: that sometimes unconstitutional actions are necessary to preserve the Union. At this point his constitutional amendment had been refused, and it seems that at the time of this letter in 1804, he had made his peace with the problem of unconstitutionality of the Louisiana Purchase.

ILLEGAL FORMS MADE LEGAL?

Both Madison and Jefferson justify serious changes in the Constitution made illegally in *Federalist* 40 and various letters respectively. Although the Declaration of Independence will be treated in Chapter 5, it is also worthy of note here that it too was a justification of an illegal action by the colonies. Today, the legality or illegality of these acts is unimportant to the average citizen, because the new constitutional law was inaugurated long ago, lost, perhaps, in the memory of the populace, in the Burkean sands of time. But in the moment, declaring independence, drafting the new Constitution, and making the Louisiana Purchase were hotly debated topics that had citizens very worried. And their worries were just, under a certain interpretation of Madison and Jefferson's actions. In the case of independence and the Philadelphia Convention, these so-called founders were taking away the established government and putting in its place something untried, with little room for the people to actually be involved in the changes. So why are they here held up as examples?

In the case of the Declaration of Independence, it may be the case that Jefferson exaggerated the dire straits the colonists were experiencing. But he was articulating

[170] Jefferson, "Jesus, Louisiana, and Malthus."

principles meant to constitute a new people, principles of life, liberty, and the pursuit of happiness that we cherish to this day. It was not just about King George III; it was about principle. In these principles lay the seeds of Madison's constitutional reforms. Those reforms explicitly protected "form[ing] a more perfect union, establish[ing] justice, secur[ing] domestic tranquility, provid[ing] for the common defense, promot[ing] the general welfare, and secur[ing] the blessings of liberty to ourselves and our posterity," among other rights. (The Bill of Rights will also be covered in Chapter 5.)

These principles mean different things to different people, just as Mark Graber stated they do. But this does not mean that they are useless as aspirations. These principles and their flexibility and interpretation over time are the reason that we do not have sharp breaks in our constitutional order the way Bruce Ackerman will argue that we do in Chapter 4. From the beginning we have had waves of illegalities by our leaders—and sometimes our ordinary citizens—that are based on these principles. They fill in the gaps in our constitutional law, rather than changing it entirely. Take for example the Civil Rights movement. Dr. Martin Luther King Jr. used Abraham Lincoln's use of Jefferson's Declaration of Independence to justify the changes he wanted to make in civil rights legislation and the way African-Americans were treated in America. He refers to the Declaration of Independence as a promissory note for freedom, and that is precisely how this dissertation interprets this document. Principles are promises. They guide our aspirations along the same paths that our ancestors used to guide their aspirations. And they allow us to fight, if absolutely necessary.

Not one of the aspirations held by those who made the kinds of changes Ackerman will discuss found making those changes easy. The Founding was not easy, nor was the Civil War, nor was the New Deal. There were opponents. In two cases there was a war. But in all cases, eventually, there was progress. This progress was neither

automatic nor foreordained. Madison hoped the Constitution would be ratified, just as Lincoln hoped to win the Civil War, and Roosevelt hoped his massive changes to federal bureaucracy and law would hold to save the country from destitution. None had guarantees. Each also acted in ways that their opponents considered unconstitutional. Most of all, each acted in ways they thought would *save* the Union.

Now, saving the Union may seem like more of a Graberian value than a critical venerative view. He, after all, wanted to save America from destroying itself in the Civil War, and is the theorist of peace in this dissertation. But just as saving the Union could be construed as a move towards the common defense, fighting a civil war to prevent the country from splitting in two (at least) is also a fight for the common defense. Balkin would likely agree with this line of reasoning, as his nested oppositions make a lot of sense here. In terms of the principles of the Preamble, in the Civil War domestic tranquility and the common defense are not opposed: rather, they are partners. To imagine them as a nested opposition it is useful to condense them into theories of war and peace, where domestic tranquility implies peace and the common defense war. If we interpret the Preamble in this way, then we are making war in order to secure peace. The common defense requires the continued union of the Union, and for that, we fight against those who would disrupt the Union and separate it into pieces. Domestic tranquility requires a solution to the constant problem of slavery, and so it needs the war to regain its peaceful state.

This, of course, is not the only way to interpret these two clauses of the Preamble; in fact, in a recent work, Graber has put the common defense into a key part of his peace argument on the other side from the argument we have just made. As he states, "Unlike establishing justice, providing for the common defense is not an aspirational goal, a purpose the Constitution hopes to achieve gradually over time. A constitution must

provide for the common defense immediately upon ratification."[171] This is true on its face. But I disagree on a different level that sees the Union not just as needing defense from outsiders, as Graber provides for, but as needing defense from parts of itself. Any system has need of aspirational common defense mechanisms, preferably ones that also embrace domestic tranquility. This is even truer of federal systems, because they are split in different ways from the start of a union and need reasons to stay together. Graber is aware of this, and thus he states "Faith in the constitutional commitment to 'domestic tranquility' seems more like faith in the constitutional commitment to the 'common defense' than faith in the constitutional commitment to establish justice."[172] But we must not only strive for justice as a high ideal: the common defense and domestic tranquility are also high principles.

Defending one's country exists not only on the battlefield, but also in the mind. Thus, contrary to Graber, if establishing justice is more than securing our legal system as it stands—a sentiment to which he would almost certainly agree—then defense and tranquility can be higher constitutional values as well. This is not to say that they are not needed in an ordinary way, but American critical constitutional veneration requires that defense also mean defense of the values the country was founded upon and domestic tranquility a certain agreement among various portions of the society as to how things should be run, about how those principles should be realized. Otherwise, what does redemption of our Constitution really mean? Justice is important, but it requires a basic agreement among many or even most people to be realized. This is difficult, to be sure. But it is either agreement or force that makes men and women concede to having changes in their constitutional orders. Force cannot change someone's mind, their soul. There

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[171] Graber, Mark. "Redeeming and Living with Evil," forthcoming, 38.
[172] Graber, "Redeeming," 40.

was no way to force even political elites to ratify the Constitution unless most of the states had already agreed (forcing New Hampshire or Delaware at the end is not the same as forcing New York, a far more potent political and physical force). A conscripted army in the North that had no attachment to the principles of Union surely would have lost. Even a packed Court would not have saved FDR's program without political elites agreeing with the substance of the plan.

Thus, as we move into a discussion of why America has not, as Bruce Ackerman argues, been through Union-breaking changes during the Founding, the Civil War, and the New Deal, we must remember how critical veneration allows for the same principles to exist through time. The illegalities discussed in this chapter were all promoting the aspirations of the American people, rather than the text of the law. Law is important, especially to the procedural pieces of the Constitution. But in times of crisis when law does not suffice, aspirations can carry the weight of critical constitutional veneration by helping to redeem that constitutional order. Aspirational principles are particularly helpful during crises like the American Revolution or the Civil War because they give us a compass to act by when our institutions may be going through rapid changes, or perhaps being ignored in parts (for example, President Lincoln's suspension of habeas corpus).

But how does this make sense with my previous argument that Jefferson venerating the principles of the Declaration of Independence is not enough? Generally, that statement is right, but it has need of a more nuanced vision of law during crises. To be sure, veneration must be connected to law most of the time. But in order for veneration to be critical veneration, people must occasionally be able to detach themselves from their institutions in order to make them better. These improvements, once made, then necessitate going back to the law that has been newly created according

to our aspirations. After all, the protest and critique required of "democratic legitimacy" cannot work without some changes in institutions. Ultimately, the fact that each time we have experienced a moving away from our laws only to come back to them with our faith in our constitutional democracy renewed gives us hope that the people can absorb aspirational values and act in the kinds of ways that Reva Siegel and Robert Post indicated with their discussion of constitutional democracy in Chapter 2.

Chapter 4: Ackerman and Veneration?

In his work, *We the People*, as well as in other stand-alone pieces, Bruce Ackerman argues both descriptively and normatively for the reality of breaks in American constitutionalism that are revolutionary in nature, breaks that split the history of our constitutional order into three distinct periods. There are several questions that are immediately evident from this synopsis: Is Ackerman right that there have been these breaks in our constitutional order? If such breaks did indeed happen, how did the constitutional order mend itself? And if such breaks did not happen, what phenomenon was Ackerman incorrectly observing? Ackerman summarizes the typical view of the American people scornfully when he states:

> The Americans: a restless and unruly people—yet remarkably restrained when it comes to playing by the rules of government. The French Revolution provoked two centuries of upheaval in Europe, but the American Revolution had the opposite effect. Two hundred years late, and only twenty-six amendments to the original Constitution—what a consensus! Or so I have been told by many admiring foreigners and, less forgivably, by many Americans.[173]

Why is Ackerman so scornful of this opinion? Why is this opinion unforgivable? It is the standard opinion, which Ackerman believes does great injustice to the revolutionary nature of the American republic, mainly during Reconstruction and the New Deal, but also during other times. I call his view revolutionary for two reasons: first, Ackerman's views should be distinguished from Jefferson's rebellious views advocated, at least partially, in this dissertation, and, second, Ackerman truly sees wholesale change during his constitutional moments that is aptly described as a revolution from what came before. By contrast, my view—which in this chapter will align with the Federalists' and Anti-Federalists' notions of what the constitutional order

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[173] Ackerman, Bruce. *We the People II: Transformations*. Cambridge: The Belknap Press of Harvard University Press, 2000, 383.

was to be, along with contemporary scholars such as Herbert Storing and Jeffrey Tulis—defends the premise that Americans have been working on the same project from the beginning based on their aspirations set forth in the Declaration of Independence and the Constitution. Thus the "changes" visible in the document are changes that conform to the purpose of the document, if we are moving in the correct direction in a general way. However, under critical veneration, it is difficult to tell in the moment whether the path is correct or whether it will need further redemption in the future. By contrast, Ackerman holds, according to historian Joyce Appleby:

> In the absence of attention to how people in the United States have come to think about a higher law, Ackerman has fallen back on a Whiggish view where love of liberty and justice is assumed to be part of the human endowment, at least of American humans. Fused convictions about democratic governance and liberal aspirations motivate Ackerman's *We the People*. His conception of their intentions resembles an ascending escalator, carrying the American public ever higher…[174]

This is not the critical venerationist account because, as much as I will argue with Tulis and Storing that there was an initial plan, there is absolutely no evidence that it would be realized in a smooth manner, constantly ascending towards constitutional goodness. Rather, as even Balkin's sunny war-less account suggests, we must stagger back and forth between constitutional progress and constitutional evil in order to reach the goodness that is promised by constitutional redemption.

Dieter Grimm's statement on the "integrative effect" of constitutions is far closer to what I will argue, and to what the Founders intended. As Grimm writes: "A constitution will have an integrative effect only if it embodies a society's fundamental value system and aspirations, and if the society perceives that its constitution reflects

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[174] Appleby, Joyce. "The American's Higher-Law Thinking Behind Higher Lawmaking." *The Yale Law Journal*. 108:8, June 1999, 1995.

precisely those values with which it identifies and which are the source of its specific character."[175] This does not mean that the constitution will not change. In fact, Grimm's emphasis on the aspirations and values inherent in a society is telling: it seems likely that he would accept changes to the actual constitutional form if whatever replaced it, by amendment, law, or perhaps even illegal action, brought that constitutional order closer to those aspirations and values.

As we saw in Chapter 3, Madison and Jefferson in particular saw the value in dismissing pieces of law as not useful to the values and aspirations of the American project. But there is consistency in the project even as they break the law. Illegalities well used can be fruitfully combined with an adherence to principles over time. Ackerman does emphasize illegal actions as important, but ultimately, as Rogers Smith points out that though Ackerman is

> reluctant to rest his case on claims of what is ultimately good, Ackerman also hopes to convince us that American constitutionalism, if recognized as the system of dualist democracy he defines, is the best system of government, at least for the American people. Somewhat ironically, it is so good because it is justified primarily in terms of legality and popular consent, not substantive goodness."[176]

To justify a political regime based on legality means that ultimately Ackerman is being inconsistent if he sides with Smith's version of Lincoln, a version very close to what is offered in this dissertation: Lincoln

> arguably went on to violate the Constitution more than any other President before or since. Lincoln's example suggests that although instilling reverence for the Constitution and the law may be a part of the political answer to generating stable support for the American regime, it cannot be the whole answer to the problem of legitimating the regime. Indeed, his wartime actions imply that such reverence

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[175] Grimm, Dieter. "Integration by Constitution." I-CON 3: 2&3 Special Issue, May 2005, 193-208.
[176] Smith, Rogers M. "Legitimating Reconstruction: The Limits of Legalism." *The Yale Law Journal.* 108:8, June 1999, 2045.

> may sometimes inhibit efforts needed to maintain the nation and to strengthen its legitimacy.[177]

Why is this contradictory for Ackerman—after all, Smith does point to Lincoln's strengthening of the nation's legitimacy? Because, as Smith also points out, legitimacy "must ultimately rest on whether the basic principles and practices of the regime are substantively good. If they are good, and if most people understand them to be good, then violations of the rule of law and popular consent will not matters so much insofar as they help establish those principles and practices."[178] This is a long way from Ackerman's disregard of the good in favor of legitimacy.

In order to better understand Ackerman's arguments, I will first develop his arguments about dualist democracy and constitutional moments in conjunction with Andreas Kalyvas's comparison of Ackerman and Carl Schmitt. This will allow me to get to one of the most important types of illegality: popular movements that do not have the sanction of the regime. Ackerman, in comparison to Schmitt, will be shown to be far less democratic than he announces, not that we should take Schmitt as an example for American politics due to the deeply problematic aspects of his theories. I will then show that Storing and Tulis make a more reasonable point than Ackerman in thinking about constitutional change.

ACKERMAN'S FRAMEWORK

In *We the People I: Foundations*, Ackerman introduces what he calls dualist democracy. Dualist democracy requires quite a bit of coordination between the people and their representatives. He explains it as follows:

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[177] Smith, "Legitimating Reconstruction," 2041.
[178] Smith, "Legitimating Reconstruction," 2042.

> Decisions by the People occur rarely, and under special constitutional conditions. Before gaining the authority to make supreme law in the name of the People, a movement's political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organize their own forces; third, they must convince a majority of their fellow Americans to support their initiative as its merits are discussed, time and again, in the deliberative fora provided for 'higher lawmaking.' It is only then that a political movement earns the enhanced legitimacy the dualist Constitution accords to decisions made by the people.[179]

In Ackerman's *We the People I: Foundations* and *II: Transformations*, he argues that these conditions were met during the Founding, during Reconstruction, and during the New Deal, on the basis of his consolidation argument. A movement is considered "consolidated" when serious questioning of the successes of the movement end, when there are "decisive moments at which deep changes in popular opinion gai[n] authoritative constitutional recognition."[180]

Andreas Kalyvas presents us with an interesting comparison between Ackerman and Carl Schmitt on the nature of forming and maintaining a political regime—and certainly this is not to compare the politics of the two men or how they might envision the ideal regime. Kalyvas borrows Ackerman's term, "higher lawmaking," as an explanation for the first relationship Schmitt sees between a people and a constitution: "the extraordinary, instituting moment of democratic founding during which the principle of identity can be approximated." The second moment is also Ackermanian—that of "normal lawmaking." But it is the third that is most interesting and that I will show is missing from Ackerman's account: the moment of a democratic people acting in the world, or, as Kalyvas puts it: "the moment of spontaneous forms of popular mobilization

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[179] Ackerman, Bruce. *We the People I: Foundations*. Cambridge: The Belknap Press of Harvard University Press, 1991.
[180] Ackerman, *We the People I*, 41.

and informal participatory intervention that exists side by side with the established political system."[181]

So, to return to Ackerman's terminology, it would appear that most of the action occurs between the first two moments: the initial moment of constitution and the consolidating moment of normal lawmaking. Kalyvas's Schmitt also thought the latter moment to be important, as he "saw the constitution as offering the only possibility for democratic sovereignty to attain a concrete and secure institutional form…Through the making of a new constitution, it leaves its extralegal position for a juridical state of stability, that is of durability."[182] "It" that is extralegal in the previous sentence means the sovereign of the people, and it is essential to Schmitt's schema that "In normal times, sovereignty becomes invisible…The people do not constantly need to be mobilized and activated. With a constitution they can rest."[183]

In the paragraphs that will follow, we will see Ackerman's movements between the original Founding moment of America, which must have existed before the Constitution (it is not clear when precisely we became a people for Ackerman) and the consolidation of the regime that has a Constitution and is constituted by it to a degree where the people "can rest." Although it will not be apparent when the ordinary people appear on the stage, they will be represented by Ackerman throughout the effort to create a new constitution by elites. Although this elite theory does not work so well with Schmitt, the rest of Ackerman's account does, and so we again turn to Kalyvas' adept comparison:

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[181] Kalyvas, Andreas. *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*. Cambridge University Press: Cambridge, 2008. 85
[182] Kalyvas, *Democracy*, 133.
[183] Kalyvas, *Democracy*, 133.

> Both Schmitt and Ackerman focus on legal disruptions and juridical discontinuities. Despite his distinct phraseology, Ackerman acknowledges that genuine constitutional changes usually break with inherited forms of legality and disrupt the existing system of laws…This tension between popular power and the established legal order, legitimacy and legality, informs several of Ackerman's most provocative suggestions.[184]

This suggested comparison should also remain in our minds for the last section of this chapter, as it states strongly not only that democracy and legality are in tension, but also, between the lines, that power and legitimacy may be opposed. If popular power becomes too strong during periods of change, what will happen to veneration, which rests on legitimacy? I will leave this as an open question, but it should be clear by the end of the Chapter that I find Ackerman's answer sorely lacking.

Beginning with the founding, we see that instead of the opponents of the Federalists protesting "Federalist lawlessness by boycotting the elections [for the ratifying conventions], thereby depriving them of their legitimacy…Instead, they responded to the Convention's appeal to the People by competing for support in a relatively fair and open contest,"[185] allowing for what Ackerman calls "quasi-direct democracy."[186] As the Federalists moved from the Annapolis to the Philadelphia convention, from debating in Virginia to New York, they encountered a number of legal difficulties, and Ackerman emphasizes these difficulties in order to show that the people were there at each step to accept or deny the illegal proposals.[187] They made these proposals during the procedural steps of signaling, proposing, triggering, ratifying, and consolidating their constitutional authority."[188]

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[184] Kalyvas, *Democracy*, 165-66.
[185] Ackerman, *We the People II*, 84.
[186] Ackerman, *We the People II*, 84.
[187] Ackerman, *We the People II*, 39.
[188] Ackerman, *We the People II*, 66.

Signaling occurs when "the new movement ha[s] gained sufficient political authority to demand that others take its constitutional intentions seriously."[189] Proposing then moves into actual actions taken by a branch of the government that changes the rules of the game—for example, the Emancipation Proclamation.[190] Triggering involves shifting reform into acceptance by the people as a constitutional *fait accompli*, or in the case of Andrew Johnson's triggering after the death of Abraham Lincoln, he "shifted the constitutional baseline from the one established by Article V."[191] Finally, ratifying means acceptance by the people and consolidating means politicians of the future acquiesce in the new precedent created by this five-stage process. These procedures are then repeated, according to Ackerman, after the Revolutionary period, during Reconstruction and the New Deal.

When Ackerman moves to Reconstruction, he defines that period as

> just that—rebuilding the Union from the ground up. The Reconstruction amendments—especially the Fourteenth—would never have been ratified if the Republicans had followed the rules laid down by Article Five of the original Constitution. The Republicans were entirely aware of this fact, as were their conservative antagonists. The amendments gained recognition only because the Reconstruction Congress successfully challenged, with remarkable self-consciousness, two basic premises of the system for constitutional revision handed down by the Founding Federalists.[192]

These two premises, federalism and change through elected assemblies, Ackerman notes, are to be thrown out the window with the Reconstruction amendments—the processes by which consent was given in the founding era no longer holds. But though it is certainly right that in principle that those principles were important at the founding, we must ask ourselves how important. After all, the founding innovation was illegality, and it is hard

[189] Ackerman, *We the People II*, 127.
[190] Ackerman, *We the People II*, 131.
[191] Ackerman, *We the People II*, 140.
[192] Ackerman, *We the People I*, 45.

not to see the initial railroading through of the Reconstruction amendments by the North onto the South for readmission to the Union as illegal by the standards explicitly laid out in the Constitution. Interestingly enough though, when thinking about the Founding, we should consider William Forbath's questioning of Ackerman's account:

> Or, to pose the problem another way, does Ackerman's account of the Founding events of 1787-1788 ironically treat as legally authoritative the one prior 'moment' in our constitutional history that was arguably the most unconventional of all: the revolutionary transfer of authority from empire to republic that occurred during the months surrounding the decision for independence?[193]

If Forbath is right and the moment of the Declaration of Independence must be considered a legal foundation, despite its actual illegality in throwing off the bounds of the Crown, where does that leave Reconstruction, with its use of the amendment procedure as an example of illegality? Ackerman's case here given Forbath's questioning is not very strong.

When he arrives at the New Deal, Ackerman notes that "The New Deal revolution, then, broke with Article Five in two different ways: (1) it substituted a model of Presidential leadership of national institutions for a model of the assembly leadership based on a dialogue between the nation and the states; (2) it used transformative opinions as amendment-analogues."[194] This then allowed another means to reach the end Article Five intends: "It simply provided the People with another, more nation-centered, alternative in which the Court responds pragmatically to the sustained demands for constitutional change voiced by the President and Congress on the basis of an escalating series of electoral mandates from the citizenry."[195] But what role did the people actually play? Forbath again has an incisive vision of what Ackerman is actually doing:

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[193] Forbath, William E. "Constitutional Change and the Politics of History." *The Yale Law Journal.* 108:8, June 1999, 1940.
[194] Ackerman, *We the People II*, 271.
[195] Ackerman, *We the People II*, 348.

> Ackerman asserts rather than demonstrates an equivalence between the outlook of reform elites and those of popular movements. The latter are the seedbed of new constitutional visions in Ackerman's theory, yet we never glimpse them or their visions in his narratives. To put it harshly, for Ackerman, the popular will was whatever the elites said it was, and this **[1924]** equation helps underpin the claim that popular deliberation and decisionmaking are at the heart of the Ackermanian higher-lawmaking process.[196]

As we have already seen in the example of Frederick Douglass and the abolitionist movement and will see especially in the discussion of Martin Luther King Jr. in the Conclusion, popular movements are not controlled by the ruling elites. In fact, returning to the motif of public opinion in Chapter 2, we should note with Eric Foner that the elites are not even the ones who provide the language in social movements. That language is adopted later by the establishment, or as he writes:

> Abolitionists invented the concept of equality before the law regardless of race, one all but unknown in antebellum American jurisprudence. Before the Civil War, the movement was thoroughly alienated from a succession of administrations that seemed firmly in the grasp of the 'Slave Power' (as antislavery Northerners came to call the planter class).

It is also important to note how important the critical aspect of veneration was in the abolitionist movement, which, as Foner points out below, only makes sense in the rewritten language of Reconstruction that the abolitionists created:

> Yet, in the ideas of a national citizenship and of equal rights for all Americans, abolitionists developed a constitutional outlook that would flourish during and after the Civil War. They glimpsed the possibility that the national state might become the guarantor of freedom, rather than the enemy, another idea written into the Constitution during Reconstruction.[197]

Ackerman notes that in considering changes to the Constitution, we should begin by assessing Article Five change. But his "more fundamental question" is "Should modern Americans read Article Five as if it described the only mechanisms they may

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[196] Forbath, "Constitutional Change and the Politics of History," 1923-24.

[197] Foner, Eric. "The Strange Career of the Reconstruction Amerndments." *The Yale Law Journal*. 108:8, June 1999, 2005.

appropriately use for constitutional revision at the dawn of the twenty-first century? The text does not provide an answer…"[198] Ackerman himself argues for a pluralistic approach, one that can incorporate Reconstruction and the New Deal as amendments to the Constitution. If Ackerman is to be consistent, then he must choose between the illegalities he describes proudly to be characteristic of the American project and the legalistic pluralism he argues makes the system coherent, that is, if the pluralism is as legal as he states it is. As Rogers Smith notes: "In the end, Ackerman's legalism leads him to underemphasize what the nation's experience during the Civil War and Reconstruction teaches about the problem of political legitimacy"[199]—namely, as the second part of this quotation used earlier in this chapter shows, that legitimacy ultimately rests on goodness, not legality as Ackerman makes it out to seem.

In order to sync Ackerman with himself in this theoretical difficulty, it is most helpful to view his arguments through the lens of illegality, as that is where he hangs his hat for most of the two volumes of *We the People*. However, if adding the pluralist argument would make this illegality would be ameliorable illegality—meaning, the consent of the people at the end of the process can transform illegal actions and programs into legal ones, even if they were not initiated through Article Five procedure—his argument becomes a more coherent whole.[200] Therefore, this is the way the Philadelphia Convention worked, so it seems quite reasonable to attribute the same rationale to an altered version of Ackermanian theory.

But still, I do not agree that the recreation of the Union through constitutional moments was necessary to make it possible to justify illegal activities in the service of the

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[198] Ackerman, *We the People II*, 15.
[199] Smith, "Legitimating Reconstruction," 2042.
[200] See the discussion of *Federalist* 40 in Chapter 4

Union at large. Certainly, Reconstruction and the New Deal were special times in American history, but the seeds of those movements existed at the time of the founding. Reconstruction through the Thirteenth and Fourteenth Amendments and the conflicts those amendments caused were evident in founding debates over representation of slaves and the belief by some founders that slavery should not be tolerated in the American Union. The Civil War was a realization of the founders' worst fears, and, although Ackerman makes a good case for how aspects of the post-war Reconstruction era were illegal, I do not think illegality to be new—and for that matter, neither does Ackerman. The founding was illegal, at least until, as James Madison argued in *Federalist* 40, the people bestowed their approbation on the new Constitution. In the case of the New Deal, I also accept Ackerman's premise that new ways of non-Article Five change were important, but I am not sure that pioneering judicial opinions did not exist from the start, or that they maintain the model of illegality Ackerman wants to demonstrate. John Marshall's opinions in *Marbury* and *McCullough* both seem to me to be revolutionary, and they came at the start of the republic. From *Marbury's* statement of judicial review—not new to the founders, but new to how the Court system would work—establishes justices as deciders of when political questions exist and when they do not, and leaves it to justices to justify those decisions. In *McCullough*, the future extent of national power can be glimpsed. In short, there are precedents from the beginning to show how national the system will probably become, contra Ackermanian theory.

A propos of the power of judicial precedent, James Boyd White argues, Marshall was able to draw on the "mythic origins of the Constitution [which] not only place the power of exposition naturally in the hands of the Court, they inform us as to the spirit and manner in which that power should be exercised," as well as reminding us that the original constitutive power of the people is gone. Furthermore, White argues, because of

the style and content of the opinion, "Marshall's opinion seems to be less an interpretation of the Constitution than an amendment to it."[201] Although I tend to agree that Marshall fundamentally changed parts of the Constitution, it is troubling, both for Ackerman and myself, to imagine the Constitution solely explicated by the Court. Nevertheless, one of Marshall's "amendments" has to be seen as the increasing nationalization of America.

Not only was the Constitution much more national than it was sold to the anxious states as in 1787, but it was designed to become more national over time. If this analysis is correct, Ackerman is confronted with some difficulties. Although he acknowledges the nationalism of the founders,[202] he does not go far enough. Men like Hamilton and later Chief Justice John Marshall were truly working towards nationalism from the beginning. The Anti-Federalists were aware of this strain in Federalist constitutional thought, and thus for good reason were quite suspicious of the project. Introducing a collection of Anti-Federalist works, Ralph Ketcham notes that according to the Anti-Federalists,

> The aspirations of the Federalists for commercial growth, westward expansion, increased national power, and effective world diplomacy were in some ways attractive and worthy, but they also fitted an ominous, all-too-familiar pattern of 'great, splendid…consolidated government' and 'Universal Empire' that the American Revolution had been fought to eradicate.[203]

I agree with the principle Ketcham elaborates here, if not the sentiments—regret and fear for the future—with which the Anti-Federalists would surround it.

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[201] White, James Boyd. *When Words Lose Their Meaning*. University of Chicago Press: Chicago, 1984. 262-63

[202] Ackerman, *We the People I*, 46-47.

[203] Ketcham, Ralph. *The Anti-Federalist Papers and the Constitutional Convention Debates*. New York: Signet Classic, 2003, 20.

HOW TO IDENTIFY ACKERMAN'S "CONSTITUTIONAL MOMENTS"

Ackerman's constitutional moments at first seem to only be identifiable *post hoc*. However, although he does not back this up with explanations of what other movements qualify under the "Federalist precedent" of constitutional moments, he does note that there are other "serious movements…entitled to sustained study" that he does not specifically identify (though from his first volume of *We the People*, we should assume that the civil rights movement is one of them, as he later confirms in his Holmes lectures in 2006).[204] He justifies this lacuna by invoking the specter of partisanship: it is easier to identify movements that everyone will agree with as constitutional moments if everyone is now agreed that the end result was good, just, and—eventually—legal (although his use of the New Deal calls that particular motive into question given the Republican Party's continued attack on some New Deal programs).

But how can we identify these moments? Ackerman would argue that the stages of "signaling, proposing, triggering, ratifying, and consolidating… constitutional authority"[205] should alert us to the presence of a constitutional moment. But waiting for the five stages to occur would mean that we can only distinguish these moments from other moments in history that were less fully formed or less in concert with the wishes of the people *post hoc*. This is problematic. Additionally, it seems difficult to go along with Ackerman's theory as the only non-Article V means of change. What of social movements that use far less of the establishment's authority than Reconstruction and the New Deal did? What if the movement appears from the ground up instead of relying on what I still believe—despite Ackerman's objections—is a far too anthropomorphic notion

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[204] Ackerman, *We the People II*, 69.
Ackerman, Bruce. "2006 Oliver Wendell Holmes Lecture: The Living Constitution." 120 Harv. L. Rev. 1737. May 2007
[205] Ackerman, *We the People II*, 66.

of "We the People" led by elected representatives?[206] It is anthropomorphic because it is not clear, again, despite Ackerman's objections, that actual individual people are doing much beyond voting in Ackerman's general schematic. In the paragraph I cite in the previous footnote, Ackerman does not focus so much on institutional power-models—otherwise known as the Presidency, Congress, and Court as actors—as on citizen participation. Elsewhere in his books he minimizes the role of citizen participation by maximizing the role of institutional actors and using vague explanations for how the citizens would participate (for example, his use of the word "dialogue" without any explanation for how a dialogue might begin), a problem to which Forbath has already called our attention.

For example, in his Oliver Wendell Holmes lectures at Harvard, Ackerman writes a great deal about the changes that came from the Civil Rights Movement, though it is unclear how social movement actions, rather than institutional actions, really affect the political arena. This development of the literature surrounding the Civil Rights movement in his Holmes lectures should be contrasted with his quite minimal treatment of that movement in either *We the People* volume. One interesting aspect of Ackerman's

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[206] "For me, 'the People' is not the name of a superhuman being, but the name of an extended process of interaction between political elites and ordinary citizens. It is a special process because, during constitutional moments, most ordinary Americans are spending extraordinary amounts of time and energy on the project of citizenship, paying attention to the goings-on in Washington with much greater concern than usual. If the higher lawmaking system operates successfully, it will channel this active citizenship engagement into a structured dialogue between political elites and ordinary Americans—first giving competing elites the chance to elaborate alternative constitutional meanings; then inviting citizens to share in the debate and cast their votes. These votes, in turn, shape the constitutional debate and decisions of political elites during the next period, which are then subjected to citizen debate and decision at the next election; and so forth. If this dynamic is working well, the result will be increasing convergence between the talk that is going on in the country and the talk occurring in the capitol. As a constitutional solution is hammered out, the prevailing elites and the majority of citizens will share common concerns and basic aims to a much higher degree than usual. The process ends as the general citizenry retreats from its extraordinary levels of engagement, leaving political elites to engage in normal electoral competition in a way that is broadly consistent with the terms worked out in dialogue with the People during the preceding period." (Ackerman, *We the People II*, 187-88)

use of the Civil Rights movement in *We the People I* regards how important Court cases should be viewed in the context of their time. There Ackerman discusses the "prophetic course of instruction" in *Brown* and *Griswold* by the Supreme Court. He uses the Civil Rights movement as a benchmark for participation, which seems reasonable. However, when Ackerman dismisses prophetic instruction by the Court in the name of dualist democracy, I admit I find his reasoning less than convincing. Ackerman, much as he protests to the contrary, does not focus on ground-up initiatives, but rather on the actions of political figures who might interact with the people more during a constitutional moment than usual, but are hardly populist figures. Although dismissing the prophetic may be wise, it is difficult to see how Ackerman makes the case he claims to make.[207]

Another invocation of King in *We the People I* is curious, as he places him alongside Madison, Lincoln, and Roosevelt. How does this make sense if the Civil Rights Movement was a constitutional moment not yet worthy of mention in *We the People*'s pantheon of 3 (Founding, Reconstruction, and the New Deal)? From my view, it does not make sense, and it calls attention to the larger problem in Ackerman's constitutional moment theory: by emphasizing only the biggest moments in American history, constitutional moments do not necessarily overlap with successful social movements. This is problematic because social movements are usually ground-up movements that Ackerman should prize, though it is hard to say if he actually does or not.[208]

This leads well into his next mention of King—this time alongside Jefferson—as an exemplar of what social movements should be. But then two pages later Ackerman distinguishes political from social movements that are types of revolutionary reform.

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[207] Ackerman, *We the People I*, 138-139.
[208] Ackerman, *We the People I*, 160.

Perhaps this is why the Civil Rights Movement is distinguished from the other "real" constitutional moments—constitutional moments could be political moments only? But given how much of an effect the Civil Rights Movement had on politics, it seems that it would be very difficult to separate political from social movements. Overall, this potential separation seems bizarre, but remains unexplained in Ackerman's work.[209]

The moments that appear as constitutional moments in Ackerman's Holmes Lectures appear to be somewhat different from what he defines in *We the People*—namely, there are eight of them. He goes from the founding to the Jeffersonian revolution to the Jacksonian revolution to the Republican revolution to the Populist revolution to the New Deal to the Civil Rights Movement to now (whatever that means, as it is not defined what moment we are in at present, or who is aiming to change the status quo). But they are not always successful: as Ackerman notes:

> With each turn of the wheel, the oppositional movement proposes a revisionist diagnosis of the public and its problems - sometimes gaining massive support from the American people, sometimes falling short…The living Constitution is a product of these eight cycles of popular sovereignty, and its study requires careful attention to the themes and variations elaborated over the course of two centuries. History is full of surprises. No cycle is the exact replica of any other. But if we are to understand the real and existing American Constitution, we must put each cycle in the context of the others, summing up the constitutional conclusions reached by the American people over two centuries of struggle. We cannot blindly suppose that the formal constitutional text tells us all - or even most - of what we need to know.[210]

Then, moving away from the eight cycles, some of which were successful, others not so much, Ackerman moves to his main example: the Civil Rights Movement, now considered a successful moment. Ackerman begins his discussion of the civil rights movement as one of his eight constitutional cycles by defining *Brown* as a signaling

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[209] Ackerman, *We the People I*, 209.
[210] Ackerman, "Holmes," 1758.

event, one that was followed by not very much presidential action by President Kennedy. When he was assassinated, however, and Lyndon Johnson assumed the Presidency, he was able to enter the proposal stage with the Civil Rights Act of 1964. Ackerman then argues that "the campaign of 1964 culminated in a triggering election, which legitimized the Act's revolutionary reform in the name of We the People—authorizing further landmark statutes and pushing the institutional dynamic toward a fourth stage: ratification."[211] This process ended with the Nixon administration's consolidation of key Civil Rights victories by statute and Supreme Court mandate.[212] Where, besides voting, are the People-with-a-capital-P involved? The short answer seems to be: they aren't. What are potential reasons for this? Ackerman could be worried that too much action by the People would prove problematic on a large scale because they might not properly channel their ambitions into the institutional process. Beyond that, I simply cannot guess his reasoning, especially considering the fact that his two benchmarks for goodness of a political order are popular consent and legality—should not then popular consent and the popular action it takes to derive consent be far more important to Ackerman?

CRITICAL VENERATION AND ACKERMAN'S MODEL: INCOMPATIBLE?

At the start, it would seem that Ackerman does follow a sort of critical veneration theory, as he begins his first volume by stating

> Lest I be mistaken too quickly for Pangloss, let me say that, even if this project succeeded beyond my wildest hopes, it does not lead straightaway to Utopia. As we discover the distinctive features of our Constitution, we will find much that is imperfect, mistaken, evil in its basic premises and historical development…We

[211] Ackerman, "Holmes," 1771.
[212] Ackerman, "Holmes," 1785.

> cannot remain comfortable with the status quo; the challenge is to build a constitutional order that is more just and free than the one we inherited.[213]

This sounds very much like critical veneration, but we know that Ackerman is missing the venerative part, and ends up mainly critical. To venerate, especially to venerate beginning with the founders, is fundamentally a preservative enterprise, not a dismantling one. Ackerman dismantles rather than preserves because he chops constitutional history in three, rather than seeing the constitutional order as a growing unit that allows revolution on the terms of the people and only the people—not by the government constituted according to dualist theory.

Ackerman's discussion of the Federalist period requires an understanding of the unique nature of the American Revolution. He believes that this notion has been lost because of the modern take on what revolutions might mean. According to Ackerman, "during the nineteenth century, Americans had no trouble recognizing Publius as a successful revolutionary. Indeed, they endlessly contrasted their own successful Revolution with the sad failures of the Europeans to make a decisive break with entrenched despotisms."[214] These days, we apparently are more likely to consider the founders counter-revolutionary, under the tutelage of scholars like Charles Beard. But it is unclear what exactly a revolution is for Ackerman by the end of his discussion in this book. As noted earlier in this Chapter, Ackerman identifies moments sparingly (3), but seems to have a theory of constitutional cycles (8) that is far more extensive. Thus his three main moments—the Founding, Reconstruction, and the New Deal—are not complete benchmarks for where the American system breaks and must be revamped. Does this mean that the American system changes with every major election that changes

[213] Ackerman, *We the People I*, 5.
[214] Ackerman, *We the People I*, 201.

pieces of the political game? It is unclear to me whether Ackerman would agree with that assessment or not.

In *We the People II*, however, Ackerman returns much more strongly to his three phase revolutionary theory, discussing mainly Reconstruction and the New Deal. Here it seems worthwhile to cite at length both one of Ackerman's discussions of the revolutionary nature of the Thirteenth Amendment, and then a passage explaining why the Fourteenth Amendment was so revolutionary and what it did to the country. The first passage is as follows:

> The present chapter begins with the election of Abraham Lincoln in 1860 and how it operated as a *signal* for an intensive round of unconventional constitutional activity; it then proceeds to Lincoln's Emancipation Proclamation, and its use in the Presidential elections of 1864, to provide a mandate from the People that legitimated the Congressional *proposal* of the Thirteenth Amendment; then to the ways Andrew Johnson used Presidential power to *trigger* an unconventional process of ratification in the Southern states; then to describe how the President managed *to win unconventional ratification* from the Southern states; and finally to the role played by Seward's proclamation of December 18, 1865, in *consolidating* the new amendment.[215]

The explanatory passage reads as follows:

> As the next chapters suggest, the constitutional effort to define the grander Ideals of the Fourteenth Amendment catapulted the country into a profound constitutional crisis, generating a cycle of bitter disappointment, mass popular mobilization and institutional improvisation. As this struggle threatened to spin out of control, the fact that Americans had already succeeded in hammering out a shared, if minimal, sense of constitutional meaning in enacting the Thirteenth Amendment was more important than it might seem on the surface.[216]

These passages showcase Ackerman's theory of constitutional moments: they show the five stage process where Ackerman claims the people join the government in creating constitutional change and the extreme difficulty in making those changes stick. Despite

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[215] Ackerman, *We the People II*, 124.
[216] Ackerman, *We the People II*, 159.

my qualms about Ackerman's argumentation generally on revolutionary reforms, it seems that with Reconstruction, his argument is strongest. However, he also identifies "mass popular mobilization" as a piece of a dangerous cycle, something that is disturbing to advocates of democracy. As we move on to the New Deal, I believe his argument weakens again; for how do transformative judicial opinions actually create a revolution? Is it merely a revolution in the thought patterns of elite Americans, or is it a revolution of the way government works? Ackerman would probably argue that both are true, but the latter seems particularly tenuous. It seems unlikely that it is a speedy revolution in what people think, because most people do not have access to Court opinions or the knowledge it takes to interpret them.

In his treatment of the New Deal, Ackerman compares it to Reconstruction, stating that

> Just as the ratification of the Thirteenth Amendment involved different dynamics from that of the Fourteenth, the Roosevelt revolution went through two cycles. During the 1930's, the nation struggled with the constitutional implications of the Great Depression; during the 1940's, with those of the Second World War. In both cases, the basic thrust was the same—away from laissez-faire and toward activist government first at home and then abroad…

The myth of rediscovery treats this struggle as a grievous misfortune, a tragic waste of time. I emphasize, in contrast, its positive contribution to the democratic quality of debate and decision. As in Reconstruction, the conflict between the branches presented critical choices to the American people with extraordinary drama and clarity. The ultimate outcome was a redefinition of Americans' relationship to government that was more reflective and more democratic than it would have been otherwise.[217]

Having an activist government simply does not seem to be extraordinarily revolutionary. To be sure, it was new in some ways. To move from a paradigm case like

[217] Ackerman, *We the People II*, 281.

Hammer to one like *Darby* is quite a shift. But to say that the people were involved in a revolution using dualist democracy does not seem right. Perhaps the four-time election of Franklin Roosevelt and the Democrats in Congress counts as a "mandate," but an electoral mandate does not a revolution make. It is thus difficult to justify Ackerman's use of his revolutionary doctrine.

I will now shift to explaining what I think makes a better model for the movements that have accompanied the growth of the American regime. Were I to use the word revolutionary in this discussion, I would not mean it in the same way as Ackerman, but instead as something new that builds on the old foundations made at the Founding. This is not to say everything old is new again in these moments, and certainly is not to say that Ackerman's focus on three important pieces of our history as turning points is wrong. I even agree with Ackerman, as I stated before, that many of the shifts in American thought during the periods he calls constitutional moments are based in some form of illegality. Illegalities that are then ratified by the country, however, do not seem to me to be the same as revolutionary breaks. For example, I would not break the Union at the moment Abraham Lincoln suspended *habeas corpus*, but I would call that action illegal. Thus, I will argue that we must look at the regime as a whole—perhaps even beginning from a place similar to Ackerman's beginning—and watch it grow in fits and spurts over time.

WHY WE MUST CRITICALLY VENERATE CONSTITUTIONAL INSTITUTIONS

First, it is notable that Smith identifies a place in Ackerman's work where he basically concedes my main point: that the Constitution has evolved in one recognizable piece:

> Though Ackerman repeatedly tries to make American processes of constitutional transformation look as legally legitimate as possible, he in fact essentially concedes that these claims are unconvincing. In his more optimistic statements, he stresses that there is a plausible 'sense in which the American Constitution remains continuous despite periods of unconventional activity.[218]

However, as I imagine this is a slip on Ackerman's part, I will continue the argument as if he always maintains his theory of revolutionary breaks at constitutional moments.

Jeffrey Tulis argues that constitutional interpretation cannot be clause-bound, but rather must rest on constitutional interpretation as a whole. This interpretation itself must not be merely the decision of the Court, but rather, as Sotirios Barber argues, the decisions with which the frame of the constitutional government accords:

> the decisions of the Supreme Court are only authoritative when they are adequate articulators of a constitutional frame of mind. If the Constitution is truly supreme, Barber shows, decisions of the Court can not *determine* (in the sense of make, or create) the Constitution's meaning, they can only attempt to discover it. It follows that they can, and often do, fail to articulate the meaning of the Constitution.[219]

A critique of Ackerman follows from this reasoning because Ackerman focuses on the particular structures of each branch at a specific time to signal his constitutional moments. This approach disables him to see what Tulis sees:

> But the familiar argument is that such change [between the nineteenth and twentieth century political orders] represents a constitutional revolution is wrong, or mostly wrong. Properly conceived, the Constitution is better understood as the generator of these developments rather than the repudiator of them, or most of them."[220]

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[218] Smith, "Legitimating Reconstruction," 2052. See Ackerman, *We the People* II, 397 for the quotation.
[219] Tulis, Jeffrey K. "The Constitutional Presidency in American Political Development." in Fausold, Martin L. and Alan Shank. *The Constitution and the American Presidency*. State University of New York Press: Albany, 1991, 143.
[220] Tulis, "The Constitutional Presidency," 134.

Thus we can understand Tulis as arguing that the framing of the Constitution led to change over time as the institutions of government developed in concert with each other and the American people.

So how does critical veneration fit into a picture like Tulis's as opposed to Ackerman's? Critical veneration makes far more sense within a system that changes radically over unbroken time than a system with constitutional moments that radically break time and stability. Critical veneration, like any other kind of veneration, requires time to germinate. Alongside critical veneration we can observe constitutional aspirationalism also growing over time. If a system develops out of itself in an aspirational manner, it builds on itself internally in tandem with the outside world. Furthermore, as Tulis argues in the rest of his book chapter, most of the major changes like the New Deal that Lowi and Ackerman identify as a break with the past are contained in the controversy over the new Constitution fought between the Federalists and Anti-Federalists. I find this argument convincing and will build the rest of my argument for critical veneration in radical times off of this premise.

By contrast, Ackerman is arguing that without seeing those shifts as constitutional moments, we deny the creativity of the American people. But to say that our most generative capacities require illegality is not to agree with Ackerman's premises that the Constitution was created nearly altogether new with the advent of the Reconstruction Amendments and the New Deal. Founding from illegality—or, perhaps refounding from illegality if we stretch the meaning of the Reconstruction Amendments and the New Deal—sits on precedent from the founders themselves.

Never do the founders say that creative illegalities must stop with the founding. Article V is an option for change, not the only option for change. Rather, the founders

left it open to people to rebel against their governments. As James Wilson, second most influential member of the ratifying convention, wrote in his *Lectures on Law*:

> the sovereign power residing in the people, they may change their constitution and government whenever they please—is not a principle of discord, rancour, or war: it is a principle of melioration, contentment, and peace. It is a principle not recommended merely by a flattering theory: it is a principle recommended by happy experience. To the testimony of Pennsylvania—to the testimony of the United States I appeal for the truth of what I say.[221]

But what might this mean? Wilson's premise is that civil society underpins the government, and thus to change the government does not fundamentally change the American people. Furthermore, what is essential to Wilson's argument that the people themselves are actually changing the government—not their elected representatives.

These arguments about democratic constitutionalism and the importance of civil society underscore the importance of a Madisonian approach to constitutional stability. Over time a people can evolve and this is good, but they should evolve in an organic way that can only be achieved well by the stability Dieter Grimm points to in the quotation at the beginning of this chapter: by maintaining identity over time. This is why critical constitutional veneration is so important, because it allows for a certain sort of revolutionary change without making gaping breaks in political history. If Ackermanian revolution is all that is available to a people, I would argue that their social and political lives are missing something, a sense of what it means to learn from your roots—in this case, the aspirations in the Declaration of Independence and the Constitution—and make thoughtful and powerful changes to realize the truth of what those roots can offer a polity.

Interestingly enough, Kalyvas' description of Schmitt seems to support a form of veneration of constitutional texts:

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[221] Wilson, James. *Collected Works of James Wilson*. ed. Kermit L. Hall and Mark David Hall. Liberty Fund: Indianapolis, 2007, 443.

> The constitution is not only a formal text. It keeps alive the founding moment and preserves the memory of the popular origins of a political regime. It incarnates the political unity of the people, the identity of the regime, and the sources of its legitimacy. For this reason, the citizens must be loyal to a set of higher, substantive, political forms and principles and should identify with their constitution rather than with some prepolitical, abstract, moral values, or even with a purely organic ethnic mythical past. Schmitt argued, in a tone that anticipates today's discussions about constitutional patriotism, that 'unity rests, therefore, before anything first in the Constitution, recognized by all parties: in fact, the Constitution, which is the common foundation, demands an unconditional respect. The ethic of the state becomes the ethic of the constitution.[222]

This is too authoritarian in its demand for total unity to be critical veneration, but in addition to bringing veneration once more to the fore, it also leads me to ask once again what the relationship should be between veneration and popular sovereignty. Schmitt seems to be for both, if we examine his notion of the people being first above the constitution in their extraordinary-constitution-making power, and then his people being able in their third moment (forgetting for now the second moment of ordinary lawmaking) to exist in "spontaneous forms of popular mobilization and informal participatory intervention that exists side by side with the established political system."[223] Can a people exist as the first and third moments as well as the second moment?

It is difficult to know how to answer this question. The first and third moments might exist in one of two ways: tutored or untutored. If they are tutored, perhaps, like the Civil Rights Movement led by King, they are able to keep their ambitions contained to one stream of activism, which would probably be where the people mobilized as a whole would be most effective. But what if they are untutored? Will they be able to create a constitutional order from scratch and then know when to change it? The latter is definitely possible, as the people may have been educated to be able to buck the system

[222] Kalyvas, *Democracy*, 161.
[223] Kalyvas, *Democracy*, 85.

when necessary. But to expect the first may be as bizarre as expecting a Rousseauian lawgiver to appear to give the people their first laws in accordance with some pre-existing general will. Thus it seems unlikely that an untutored people could do what Schmitt suggests.

What is the importance of being tutored or untutored? It appears that in Ackerman's account, the people are ruled by institutions that do not give them much leniency to participate at all, outside of voting and generally approving or disapproving of government actions. This is not serious involvement. However, in accounts of constitutional democracy that we discussed in Chapter 2, or even in Schmitt's conception of popular action just cited, the people by necessity must have a role. Furthermore, not to allow the "People" a role seems downright odd in an Ackermanian system of constitutional moments where breaks are supposed to be in the public interest. How does the public show its interest? Voting is not enough. However, tutored does not mean excessively tutored. Having learned from outside mentors or other political systems how to act when there is a problem in your own backyard is not to be disparaged. Being excessively tutored, or perhaps even ruled, in order to serve your individual interests, however, is somewhat perverse and odd.

Furthermore, how can popular sovereignty stand a chance against veneration if a populace is overly tutored? Veneration is important, but this dissertation advances critical veneration for a reason. Schmitt's conception of veneration that I quoted at length several pages ago is good in moderation, but terrifying in excess. To venerate to the point where you do not know what is wrong with your system, especially if there are outside models that should show you there is another way, is a terrible way of using the wonderful effects veneration for a political order can create. It is, at the very least, a type of blind veneration. At the most, it shows the most dangerous modes of operation of the

fascism described in Chapter 2. Fascism, as Loewenstein would certainly agree, is most often not used for the kind of democratic good he was advocating.

Ultimately, popular sovereignty cannot exist without some distance between what the people are told by the government and what they actually think and observe about the world around them. This is analogous to the dialogic communities Madison wrote about in Chapter 1 when referring to what I call cautious veneration. Without this distance, the government becomes dangerously unchecked, and the people become dangerously out of touch with the representatives they are technically choosing. Popular sovereignty needs air to breathe and most of all it needs critical faculties that are in good repair. These critical faculties are what allow popular sovereignty to be good and not just a feature of a form of government. This is a major part of why Smith and I disagree with Ackerman: goodness is one thing, popular consent plus legality is another.

So, how can we become tutored in popular sovereignty? First, by not allowing the last word during constitutional moments to be determined by institutions alone. Institutions are important and they serve functions that a large group of people cannot. President Lincoln freed (certain) slaves under the Emancipation Proclamation, not a roving band of citizens who would not have had the same authority to do so. But citizens were essential participants in the Civil Rights movement as marchers and members of groups that conducted sit ins, demonstrations, parades, and fora to discuss issues. They were tutored, perhaps, by the legendary example of President Lincoln, the experience of their ancestors who shook off the bindings of slavery, and by men like Martin Luther King, but they were self-tutored enough to respond to men like the latter in ways that were quintessentially their own. They were able to critically venerate their system enough to make a difference, and although such a goal is shared by Ackerman and myself, I would argue that his version leaves too little fresh air for the people to breathe

in new ideas and move about in social movements that are integral to his constitutional moment-based system.

Chapter 5: What Rights Meant to James Madison and Thomas Jefferson

Thomas Jefferson's commitment to rights in the form of the Declaration of Independence is famous. He also was an early and strong supporter of having a bill of rights included in the new Constitution. Jefferson's concern with rights was mainly one of rights against oppressive governments. Looking both at the example of King George III and the history of the French monarchy, Jefferson was filled with the desire to prevent any such oppression in the United States. Thus it is fitting that the committee charged with drafting the Declaration had Jefferson write the first draft. The Declaration of Independence is an important inspiration for American aspirational constitutionalism, and, as has been argued in this dissertation, should be read as containing key rights owed to Americans both as Americans and as human beings deserving of rights. It should also be read, as Abraham Lincoln would have advised, as an essential addendum to the Constitution's rights provisions and as a way to better understand the impulses behind writing the Constitution.

Even once the Constitution had been drafted and ratified by nine states, the debate over the addition of a bill of rights to the new document raged, especially in New York. As gaining New York's approval was necessary to recreating the Union under the Constitution, drafters like Madison began to talk amongst themselves about the potential additions to their Convention's work. Amidst "one of the most penetrating analyses of liberty and power ever written," Madison wrote to Jefferson that his opinion "'has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration.'"[224] In short, Madison was convinced that it was wise to frame a government of limited and enumerated powers, and, at that moment

[224] Smith, *The Republic of Letters*, 522.

at least, did not want a rights declaration to enlarge the powers of government by implying that it could do things that in truth, it could not. Thus in this examination of rights we must be careful not to simply examine rights as tools of individuals against governments as in the Virginia Declaration of Rights, the Declaration of Independence, the Constitution, and the Bill of Rights, but also as guidelines for action that show the nature of American aspirations.

Rights are good places to put aspirations because they tend to become codified both in law and in the minds of the people, both of which are necessary to fully realize our aspirations. If aspirations are only found in documents, they have no force because they become what Madison called parchment barriers. If, however, the people accept those aspirations as their own, the people themselves become bulwarks against government excess. Being granted rights also encourages people to expand those rights as their conceptions of who is truly a member of their polity expands. For an example of that phenomenon, we should refer back to Chapter 4 where Eric Foner argues that abolitionists created the language that was eventually used to justify equal rights for blacks in America. Thus, as we examine Jefferson and Madison on the subject of rights, we should remember how much rights have expanded over the course of our republic.

RIGHTS OPPOSED TO POWER

Virginia Declaration of Rights

When George Mason drafted the Virginia Declaration of Rights in May 1776, he probably had no idea that the document would be so influential for two other Virginians: Thomas Jefferson and his Declaration of Independence, written one month later in 1776,

and James Madison and his Bill of Rights, drafted in 1789.[225] The Virginia Declaration contains a strong declaration of the rights of life, liberty, property, happiness and safety, as Mason declares that men "cannot, by any compact, deprive or divest their posterity" of these "inherent rights."[226] Virtually the same clause that is in the Declaration of Independence exists in the Virginia Declaration—the right to "reform, alter, or abolish [government]"—as well as the necessity to secure the consent of the governed.

The common good is guaranteed by the Virginia Declaration, unlike in the Declaration of Independence or Bill of Rights, perhaps because the utilitarian calculation Mason is trying to make for assuring that good is so difficult to ascertain. One imagines Madison had a similar concern with the provision that declares "That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles,"[227] because all of those values are so difficult to enforce unless you have a strong civic religion or some outside influence that promotes them.

However, Madison must have found much to agree with in the references to criminal procedures for trial by jury, regulations against excessive bail, and innocence until guilt is proven, freedom of religion and conscience, press, and property. All in all, despite Mason's document's inclusion of more regulated virtue for Virginia's citizens, it provides a template for Jefferson and Madison as framers of declarations or bills of rights.

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[225] Library of Congress, "Primary Documents in American History." << http://www.loc.gov/rr/program/bib/ourdocs/mason.html>> Accessed 22 May 2012.
[226] Mason, George. "Virginia Declaration of Rights." << http://www.constitution.org/bcp/virg_dor.htm>> Accessed 22 May 2012.
[227] Mason, "Virginia Declaration of Rights"

The Declaration of Independence

The first formulation of Americans' rights as individuals in a new nation are encapsulated in the Declaration of Independence. First penned by Thomas Jefferson, the Declaration is a combination of high philosophical principles and fairly ordinary complaints against the British Crown. In order to best discern Jefferson's view of rights, as opposed to the committee that revised his original draft, we will here compare his draft with the finished version on the more philosophical pieces of the Declaration to understand what sorts of rights we understand as due to Americans.

In Jefferson's draft, he notes not just the desire for separation from the British, but the colonies "subordination in which they have hitherto remained."[228] He emphasizes that "these truths [are] sacred & undeniable; that all men are created equal & independent"[229] rather than simply being "self-evident." These differences, more than the others found between the two texts, are important because they show the nature of rights in Jefferson's mind: they are sacred. Sacred rights, rights that are "inherent & inalienable"[230] should not only be inviolable, but unquestioned. It would seem that these rights are a form of natural rights, as it seems the reference to nature and nature's god continues from the first paragraph into the second. It should once again be noted that to the Declaration's rights of life, liberty, and the pursuit of happiness is added "the right of the people to alter or abolish [government]."[231]

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[228] Jefferson, Thomas. "Jefferson's 'original Rough draught' of the Declaration of Independence." << http://www.loc.gov/exhibits/declara/ruffdrft.html>> Accessed 22 May 2012.
[229] Jefferson, "Rough draught"
[230] Jefferson, "Rough draught"
[231] Declaration of Independence (Jefferson's "draught" and final version)

The Constitution

Upon learning of the ratification of the Constitution by nine states, Thomas Jefferson writes to James Madison to congratulate him on his contribution and the success of the enterprise. Unsurprisingly he also uses this letter to address rights he argues should be in the newly constituted Union's bill of rights. Many of these rights recollect to Mason's list in the Virginia Declaration, but they are worth listing here again: "It seems pretty generally understood that this should go to Juries, Habeas corpus, Standing armies, Printing, Religion and Monopolies."[232] Before going through the exceptions to the rule of each right, he states, "The few cases wherein these things may do evil, cannot be weighed against the multitude wherein the want of them will do evil."[233] He gives many examples of the dangers during times when those rights might not be in force, but it is the suspension of habeas corpus that is most interesting to us here, given the role of emergencies in Chapter 3 where Jefferson's parallel views were examined.

Jefferson states:

> Examine the history of England: see how few of the cases of the suspension of the Habeas corpus law have been worthy of that suspension. They have been either real treasons wherein the parties might as well have been charged at once, or sham-plots where it was shameful they should ever have been suspected. Yet for the few cases wherein the suspension of the hab. corp. has done real good, that operation is now become habitual, and the minds of the nation almost prepared to live under it's (sic) constant suspension.

This getting used to living under law applies the same principles Madison calls on in his defense of veneration, except that these principles are in action for bad ends of subverting rights rather than good ones of stabilizing the government. Jefferson basically writes here that if people live too long under a bad absence of law, they will not know that they

[232] Smith, *The Republic of Letters*, 545.
[233] Smith, *The Republic of Letters*, 545.

should be living under good law. False opinion propagated by the government—that habeas corpus can be safely suspended—will eventually convince the people that they have no need of that law to be safe. But if they were used to having the writ of habeas corpus protected, then when it would be taken away there would be not just public outcry, but also public suspicion over the government's motives and proofs for doing so. This would make the people into the vigilant people Madison praises in his *National Gazette* essays and perhaps even the more vigilant people who can critically venerate the Constitution.

Therefore it is particularly interesting that Madison states on the same subject of habeas corpus that "Should a rebellion or insurrection alarm the people as well as the Government, and a suspension of the Hab. Corp. be dictated by the alarm, no written prohibitions on earth would prevent the measure."[234] This is a middle ground on bills of rights between this section of this chapter on the rights of the people and the section that follows this on the powers of government. Madison's argument here seems to be that mass panic will cause government and governed alike to abandon the law. This seems sensible. However, the correct Jeffersonian rejoinder should be that once the immediate danger is over, the safer way for the people to be is used to having the protections of habeas corpus rather than not used to having it, because once the people are calmer, they will desire to return to their previous organization of government.

The Bill of Rights

Jefferson defends the idea of a bill of rights with the suggestion that it would grant necessary powers to the judiciary to protect the people against the other branches of government. He then appears to agree with Madison when he argues that the federal

[234] Smith, *The Republic of Letters*, 566.

government is indeed limited enough that a bill of rights might not be necessary, but concludes with a more typically Jeffersonian opinion: that the new government "leaves some precious articles unnoticed, and raises implications against others," and therefore becomes an instrument that "forms us into one state as to certain objects, and gives us a legislature and executive body for these objects. It should therefore guard us against their abuses of power within the field submitted to them."[235]

Jefferson's next argument is simple: "Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can."[236] His next argument is that the "subordinate governments," otherwise known as the states, need principles "to try all the acts of the federal government."[237] Finally he simply declares that having a bill of rights is more useful than not having one, because he believes in the preventative argument regarding rights provisions against the government.

It is difficult to say if Madison was converted so swiftly to having a Bill of Rights after the convention because it was politically expedient or whether he was actually convinced by arguments like Jefferson's for the purpose of securing rights at the federal level. But in letters he wrote in 1789 as a newly elected Congressman, he seems to be convinced of the need for amendments to the Constitution to protect rights, amendments that "may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favor of liberty...particularly the rights of conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants, etc.'"[238] These rights, along with other guarantees of civil liberties,

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[235] Smith, *The Republic of Letters*, 587.
[236] Smith, *The Republic of Letters*, 587.
[237] Smith, *The Republic of Letters*, 587.
[238] Smith, *The Republic of Letters*, 591.

were inserted as amendments to the Constitution. Madison attempted to include a preamble:

> That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.
>
> That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.

Madison's preamble was not successfully added to the Bill of Rights, but it is interesting that it is a statement of principle, not of institutional design. In the *Federalist*, Madison spends most of his time focused on institutional design, pitting ambition against ambition for politicians, refining and enlarging public views by increasing the scope of the Union, defining how the federal and national elements of the Union fit together, etc. But for a Bill of Rights, principles, not only institutions, are required. Madison here states his aspirations for Americans as a people, united under or opposed to the new government. In this second paragraph, Madison gives the escape clause of the Constitution. It is one thing to allow for abolishing government as an idea in the Declaration of Independence or even in *Federalist* 40, but to put this sort of language in the Constitution could have much broader implications. If it had been added, would institutional stability or rights have won in a conflict? Would this language have disturbed the critical veneration of the people or would it simply have been a guarantee that not only can we change our government, but also we are a people of deep principles and aspirations? It is difficult to know.

Most interesting among Madison's amendments was one found nowhere else in the literature of the time, an amendment declaring "'No *State* shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.'"

The editor of Madison and Jefferson's letters describes this attempted amendment as "Madison's final attempt to write the federal veto of state laws into the Constitution and underscored his view that the principal threat to individual rights came from unjust majority factions in the states 'operating…against the minority.'" Madison adds, "I think there is more danger of those powers being abused by the state governments than by the government of the United States. The same may be said of other powers which they possess, if not controuled (sic) by general principle, that laws are unconstitutional which infringe the rights of the community.'"[239]

THE BALANCE OF POWER AND RIGHTS

In a letter to Thomas Jefferson on October 17, 1788, James Madison lays out an argument against bills of rights similar to his argument against faction in *Federalist* 10. He writes:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.[240]

The corollary argument in *Federalist* 10 is: "Complaints are everywhere heard…that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[241] Such are the actions of factions, whose members constitute what Madison calls in his letter to Jefferson: "the real power in a Government."

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[239] Smith, *The Republic of Letters*, 597.
[240] Smith, *The Republic of Letters*, 564.
[241] Madison, *Federalist* 10

Madison notes that Jefferson, due to his sojourn in France as ambassador, is probably more likely to think of examples of princes overreaching, but that in a republic different dangers exist. At least in a principality the multitude who are not able to use power to overreach can topple a prince who attempts to overreach. But in a republic, the power of the multitude can drown out the rights of small groups of individuals easily and under the name of democracy—majority rule.

Yet Madison still defends bills of rights in republics immediately after making those claims about the dangers of majoritarianism. His first reason is that "The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion."[242] This language conveys similar sentiments to that language Madison uses to talk about venerating the Constitution in *Federalist* 49, when he notes: "frequent appeals, would, in great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability."[243] The focus on stability in *Federalist* 49 encourages making "opinion" preserved by all the people about their government into something that mirrors the "national sentiment" Madison writes about in his letter to Jefferson.

This statement of Madison's that rights language will "acquire by degrees the character of fundamental maxims of free Government" answers my question in the previous section about the worthiness of rights next to institutions. It seems Madison would argue that these rights almost become institutions in and of themselves. This also takes us back to the discussion in *Federalist* 49 about opinion. Opinion is an essential

[242] Smith, *The Republic of Letters*, 565.
[243] Madison, *Federalist* 49

piece of having a constitutional government, for it makes it possible for citizens to be united together toward the particular goals and aspirations of constitutional self-government.

Madison's second reason that bills of rights should still be created in republics, whose biggest danger is majoritarianism, is that despite the danger of majorities, "there may be occasions on which the evil may spring from the latter sources [the Government]; and on such, a bill of rights will be a good ground for an appeal to the sense of the community."[244] This process of the government oppressing the people can benefit from a bill of rights, if only to remind the people that they are a community that possesses rights. However, Madison immediately begins another argument, one that sounds rather strange to those who believe the people must protect itself from the government. He writes first what seems to be an obvious argument: "Power when it has attained a certain degree of energy and independence goes on generally to further degrees."[245] But he follows this line with another: "but when below that degree, the direct tendency is to further degrees of relaxation, until the abuses of liberty beget a sudden transition to an undue degree of power."[246]

In the second statement, Madison is arguing that too much liberty is dangerous to a government. Perhaps he thinks here of the Articles of Confederation, and the degree to which states that had no real national government to govern them were allowed to govern without guidance or in direct opposition to the national government. Perhaps he thinks here of various rebellions during the 1780s that prompted the Constitutional Convention in Philadelphia in the first place. But this is certainly not an argument that we hear very

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[244] Smith, *The Republic of Letters*, 565.
[245] Smith, *The Republic of Letters*, 565.
[246] Smith, *The Republic of Letters*, 565.

often: that rights are in effect oppressing the government. One way that this could manifest itself, however, does exist today. Most people ignore the body of the Constitution in favor of the rights provisions, not thinking of how the procedural, structural parts of the Constitution are faring under one government or another.

Madison concludes, "It is a melancholy reflection that liberty should be equally opposed to danger whether the Government have too much or too little power."[247] Madison seems to be confining his remarks here to American situations only, but we can understand his words in light of his more general pronouncements on power and liberty—namely that the ruled need to be able to be the rulers and vice versa. This theme helps illustrate what is interesting to Madison about republican government in America: the compound republic can teach itself, through adherence to the Constitution and its values, to maintain a reliable balance between consent of the governed and guidance by the government. In the end, Madison—as we saw in the previous section—is a friend to bills of rights on very limited grounds, as a safeguard of liberty as far as they go, but ultimately as potentially salutary parchment barriers.

CONCLUSION

In the end, Madison and Jefferson were not as far apart as they may sometimes have seemed, especially once Madison let go of his initial opposition to including a Bill of Rights in the Constitution, or, rather, appended to it. As Adrienne Koch, a scholar who works on Madison and Jefferson, put it:

> Madison's agreement with Jefferson in regarding constitutions as subject to principled alteration was one of many convincing proofs that although he was a constitution-maker, he was not a constitution-idolator. Both men were liberal and

[247] Smith, *The Republic of Letters*, 565.

> experimental in their effort to provide a society that would meet the demands of each living being for conditions that would encourage growth and self-respect. That was why Jefferson really cared more for bills of rights than he did for constitutions…[248]

The last sentence of this quotation is particularly interesting because it puts the responsibility of forming a people not on venerating institutions, but rather on the aspirational parts of the Constitution. Madison was too concerned with veneration to agree with this position, but it is an interesting proposition that rights could be enough to constitute a people prone to "growth and self-respect." This theme will be addressed again in Chapter 6 when we examine the tension between rights and responsibilities in the thought of Mary Ann Glendon.

However, regardless of their disagreements, both Madison and Jefferson illuminate pieces of the problem of constitutions and bills of rights—neither sees either as a cure-all. Neither trusts governments to withstand the people if the people do not wish to be blocked, and both see the people as extraordinarily powerful forces if they join together, whether for Jeffersonian freedom or Madisonian factionalism. This belief both men had in the people is very different than Madison is usually portrayed, but if, again, we consider both the *Federalist Papers* and his *National Gazette* essays, as well as letters to friends and colleagues like Jefferson, Madison seems far more trusting of what a people can become if properly taught an expansive notion of civic religion and what American aspirational politics ought to be.

In the next chapter, where I discuss constitutionalism in terms of rights, many of these debates are essential to understanding the American situation. For example, Americans such as Madison were not trying to frame international rights as many groups do today, but rather to articulate universal rights in a way that makes sense in the

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[248] Koch, Adrienne. *Jefferson and Madison: The Great Collaboration*. New York: Alfred A. Knopf, 1950, 74

American context. Jefferson was thinking in a more international context, as he was living in France when these letters were written, but he was still aware that different rights might be more important for certain peoples than others—meaning that where there is no institution to protect the people they may need special rights, but that may not be true at all in other places where institutions have already created that protection.

Chapter 6: Critical Veneration and Rights

Critical constitutional veneration depends for its appeal on the movement America makes towards constitutional goodness. This goodness can be measured by exploring American constitutionalism on two planes. The first must include our commitment to rights (and particularly rights-expansion). The second notes how many people are included and who the people are who are included. Movement on both planes is required for serious constitutional change that leads to greater critical veneration. For example, although the goodness of the constitutional order was at a low during the Civil War because key rights were not being protected for African Americans, the creation of the 13th-15th amendments show an upward trend in constitutional goodness. But in order to initiate such reforms, President Lincoln and his successors needed a point of view similar to Frederick Douglass's—namely that the Constitution need not be understood as pro-slavery and blacks should begin to be a part of the larger political community. This decision moved America closer to constitutional goodness because it included more of the people who had previously been excluded from the American promise of self-government. As for the second dimension of rights, we can understand that through the expansion of rights to citizens under state governments due to the movement towards incorporation of the Bill of Rights in the twentieth century. This movement towards goodness can be understood in Balkin's formulation earlier in Chapter 2 as the end result of successful redemptive efforts.

The fact that we talk in terms of rights can be seen as positive for America's movement towards goodness in its constitutional order, because rights help articulate our key principles, principles which help us to redeem the promises made to our people by the aspirational pieces of the Declaration of Independence and Constitution. The

Declaration of Independence especially is a bulwark for our constitutional rights and aspirations. But here, we will also examine the Declaration of Independence, along with the 9th and 14th amendments to the Constitution as sources of law and principle, using the work of Charles Black. Black argues that aspirational principles, especially those in the Declaration, are laws that we must follow because they form the basis of our contract together.

At first a transition from aspirations as law to the question of whether we should use foreign jurisprudential materials in our own constitutional law may seem to be missing a necessary connective piece. That piece is the work on civil religion that Paul Kahn has done that comes very early in this second section. Kahn articulates the values behind Justice Scalia's patriotic parochialism—namely, a vision of civic religion that can only extend to those educated properly as Americans. For this conception of patriotism to work, it is essential that this, as I stated in the Introduction to the dissertation, is an essentially American project. But where does this leave Justice Breyer's more internationalist position? It explains well how aspirations might be universal among people and that is much closer to the stance of this dissertation. Both Justices are patriots, but their patriotism takes different forms. There is even research in political psychology that confirms the Madisonian instinct that, like blind veneration, there can be what Schatz, Staub, and Lavine call blind patriotism. Their term for its counterpart is constructive patriotism, a term that fits nicely with critical veneration.

After treating patriotism as an aspect of aspirationalism—after all, we are patriotic towards a nation that keeps with our ideas of what good aspirations are and should be in the future—I will move to more explicit discussion of general citizen involvement in understanding and creating the American project. This will begin with Mary Ann

Glendon's analysis of rights talk in America, which is judged by James Fleming and Linda McClain to be lacking.

In each of these sections, the underlying premise will be that the use we get from rights defined in our Declaration of Independence, Bill of Rights, and general constitutional law are profoundly important for critical veneration of law. Black makes the most unconventional argument for this, when he argues that the Declaration of Independence itself is law. It is easy to see how the Bill of Rights and other amendments connected to the Constitution would be pieces of constitutional law, but how does the Declaration fit? It is clear that it is not ordinary law that can stand on its own as the governing document for the country. Rather, it is the sort of law that contains our aspirations for our more procedural or institutional law. It is also the case that in Chapter 1 I argued that Jeffersonian veneration of the Declaration of Independence is not enough to bind a nation to any sort of veneration. The question of what kind of law the Declaration is remains unsolved here, but it is clear from the way people do in fact honor the Declaration that they have reverence for it as the code of their civic religion, even if most people would not agree with Black's assessment of it being on the level of constitutional law.

The two goals for this chapter are first to explicate how rights discourse serves critical veneration and then to show how our aspirations can be more fully realized in a system utilizing some parts, at the very least, of popular constitutionalism. But how do these two goals for this chapter merge into a single argument? First, both are focused on the centrality of rights as law, begun in America through the Declaration of Independence's guarantees of inalienable rights. Second, there is a strong link between popular constitutionalism's aim to have the people decide to alter their government and the Declaration of Independence that states that the people are allowed to alter or abolish

their governments when it seems necessary to them.[249] Third, both law according to the Declaration of Independence and law according to popular constitutionalism is centered on the people, rather than on institutions—both are quite democratic in fact. Fourth, and finally, the goals of both advance the project of this dissertation: examination and defense of critical veneration of the law. By comparing the principles in our rights language with the actual laws of the land, we can learn to venerate our government critically, with our anchor being our inalienable rights stated first in the Declaration.

CHARLES BLACK ON WHY THE DECLARATION OF INDEPENDENCE IS LAW

Would it require abandonment of law to go towards the principles of the Declaration of Independence? To put that question another way: is the fact that the Declaration of Independence is a revolutionary document primarily and not a document of governance problematic? Does the right to alter and abolish a regime that commits a long train of abuses make the Constitution less binding if we focus on the revolutionary document? Not according to legal scholar Charles Black. In *A New Birth of Freedom: Human Rights, Named & Unnamed*, Black argues that Americans have a comprehensive set of human rights derived from the Declaration. As he writes:

> Law is reasoning from commitment. Where do we find those *commitments* from which we may derive our reasoned constitutional law of human rights?
>
> On the highest level and of fully general scope, there are just three such commitments: (1) the opening paragraphs of the Declaration of Independence (1776); (2) the Ninth Amendment to our Constitution (1791); and (3) the thirty

[249] Fritz, Christian G. "Recovering the Lost Worlds of America's Written Constitutions." 68 Alb. L. Rev. 261 2005. Fritz argues that we should examine state constitutions for their reliance on principles like those trumpeted by the Declaration of Independence—namely our right to alter or abolish governments—that led states to actually write new constitutions.

> words or so that are the 'citizenship' and 'privileges and immunities' clauses of Section 1 of the Fourteenth Amendment (1686) thereto."[250]

It is easier to see how the Ninth and Fourteenth Amendments show our fundamental human rights in a constitutional context. The Ninth Amendment guarantees unenumerated rights, and the Fourteenth, using the theory of incorporation, extends those rights to a far greater number of people. These amendments also commit us as a people to certain kinds of rights protections that make us the kind of American people we want to be—at least if we assume that the framers of these amendments' intent mirrors our intentions and commitments today. But how does the Declaration of Independence fit in? One interpretation of the Declaration, after all, is that it is a political manifesto, not a legal document. But Black argues against this. He calls the Declaration "an act of 'constitution,' a *juristic* act, an act of *law*, after the manner of law in all its fields…[because] [t]hese words demolish one legal authority and set up another.[251] They are, then, *constitutive* words…[and the] Declaration is the root of all political authority among us, of all legitimate exercise of power."[252] This is a compelling argument if we consider the historical facts of the promulgation of the Declaration of Independence. As thirteen colonies, Americans were under British rule. The Declaration of Independence was a declaration of war by people who intended to change their political situation and re-constitute themselves. The colonists declared themselves no longer British subjects, and did so by announcing a program of rights—inalienable rights—that they were entitled to enjoying.

The Ninth Amendment fits nicely into Black's schematic of what rights provisions in the American case should be. It

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[250] Black, *A New Birt of Freedom: Human Rights, Named and Unnamed*. New Haven: Yale University Press, 1999, 5.
[251] See Robert Cover's argument in Chapter 2 on the violence of laws replacing each other.
[252] Black, *A New Birth*, 8-9.

> speaks of rights '*retained* by the people,' —'retained,' that is to say, in 1789—enacting that these are not to be 'denied or disparaged' by virtue of their not having been 'enumerated in the Constitution.' The crucial word is 'retained.' What 'rights' could 'the people' be thought to have had *before* the enactment of this Amendment, though these are not 'enumerated' in the Constitution?[253]

This last sentence indicates that Black is arguing that the Declaration explicated the rights prior to the Constitution, rights that existed for the people by virtue of their being human beings, human beings in particular who happened to divine their human right to inalienable rights in the Declaration of Independence. The substance of the existence of inalienable rights is of course subject to debate, and has been debated quite often in recent years as second and third generation rights become included in constitutions—most notably in the German Basic Law and the South African Constitution.

The fact that rights are inalienable in the American rights discourse is essential to our aspirational course towards constitutional goodness. For example, slavery was a direct contradiction to the right to liberty. Thus in our movement towards constitutional goodness prompted by our critical veneration of our constitutional system, slavery was abolished for good reasons that already existed within the American system. This does not mean that rights not promulgated in those three places are not rights, or at least not aspirations. The Preamble is a good example of aspirationalism, though oddly an aspirational piece that Black does not incorporate into his study. The Preamble is not just pretty language; its placement at the start of the Constitution is a testament to the necessity of using symbolic language to interpret and give life to the procedural language that fills most of the rest of the Constitution.

The Preamble, much like the Declaration, fills a necessary symbolic function for Americans' understanding of themselves. In the example of Martin Luther King we can see how these symbols help to create a forum for legal action on extending rights to more

[253] Black, *A New Birth*, 22.

Americans. As Rebecca Klatch notes in her article on political symbolism, it is important that we "understand symbols in all of their complexity—as capable of legitimating political authority and of instigating political action, as perpetuating domination and as inspiring collective rebellion, as forces of constraint and as forces of potentiality."[254] Dr. King's speeches mention both sides of these symbols, treating the oppressors and the oppressed, the potentiality for future democratic freedom and the current lack thereof. In his "I Have A Dream," he "alternated between confrontation (musing that Negroes had been given 'a bad check') and the visionary nationalism of a dream 'deeply rooted in the American dream.'"[255] This movement back and forth between admiration of the aspirations of America and wrestling with the problems of America allowed Americans to see what a version of their best selves could be and to hope to realize it, but it also condemned the actions of the present. King called out to "the architects of our republic [who] wrote the magnificent words of the Constitution and the Declaration of Independence…[who had] sign[ed] a promissory note to which every American was to fall heir. This note was a promise that all men would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness."[256]

These actions were fundamentally ones of critical veneration that took the Declaration of Independence as seriously as possible. The commitments to life, liberty, and the pursuit of happiness that King prized so highly were commitments prior to the Constitution. This strengthens Black's argument because King was a prominent interpreter of the Constitution who justified the American project to many citizens.

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[254] Klatch, Rebecca E. "Of Meanings & Masters: Political Symbolism & Symbolic Action." *Polity*. 21:1, Autumn 1988, 137-54, 154.
[255] Sandage, Scott A. "A Marble House Divided: The Lincoln Memorial, the Civil Rights Movement, and the Politics of Memory, 1939-1963." *The Journal of American History*. 80:1, June 1993, 135-167, 157.
[256] King, Martin Luther. "I Have a Dream" 28 August 1963, <http://www.mlkonline.net/dream.html> Accessed 7 December 2009.

Abraham Lincoln agreed with this approach in his Gettysburg Address, when he spoke of the beginning of the American experiment as "four score and seven years ago:" the time of the Declaration of Independence, not the Constitution. As we move to discuss patriotism in connection with rights, it is important to remember that both Lincoln and King both saw rights as universal and God-given, not as civil or constitutional. To agree with them changes the way we interpret American rights: should they be characteristic only of what our specific polity has learned in the course of its life, or should our polity take cues from others around the world? How can aspirations that either are or seem foreign to us useful or harmful to America?

EUROPEAN UNIVERSALIST RIGHTS V. AMERICAN PAROCHIAL RIGHTS?

In a debate between Justices Breyer and Scalia, Scalia declares, "It seems to me that the purpose of the Bill of Rights was to prevent change, not to encourage it and have it written into a Constitution."[257] This is one pole of American constitutional debate that is obviously far from the aspirational bent of this dissertation. But there is a significant amount of American exceptionalism that exists in a less polarized form. As Paul Kahn argues: "We remain a deeply nationalist country. Perhaps no other country is as deeply committed to its myth of popular sovereignty. We have a sacred text—the Constitution—which we understand as the revelatory expression of the popular sovereign."[258] Whether this is a mythological conception of popular sovereignty or not is not important here, but the fact that Kahn identifies a real phenomenon in American society. He pokes deeper into a quasi-Scalian consciousness to declare:

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[257] Scalia, Antonin and Stephen Breyer. "Full written transcript of Scalia-Breyer debate on foreign law." << http://www.freerepublic.com/focus/f-news/1352357/posts>> Accessed 7 June 2012.

[258] Kahn, Paul W. "American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order." 1 Chi. J. Int'l L. 1 Spring 2000

> These points of our civic religion are so firm that we find it almost unimaginable that we would yield political or legal authority to institutions and actors outside of this web of popular sovereignty and law's rule. To do so appears to us as a form of political sin, a worshiping of false gods. Consider, for example, the resistance to any sort of international court with compulsory jurisdiction, whether the International Court of Justice or the proposed International Criminal Court, or the almost impossible task that domestic courts face in trying to understand how international law applies to such domestic issues as the death penalty.

Justice Scalia dismisses Justice Breyer's reliance on international norms, preferring to back his jurisprudence with his originalism and what he considers a proper functioning of American democracy. Giving an example with regard to abortion, he states: "I regard the Constitution as having set a floor to American society...change is brought about by democracy. Abortion has been prohibited. You want to change that?....eliminate the laws against abortion."[259] By contrast, Justice Breyer wants to learn from the international sources that frame issues we have in different ways. He uses a campaign finance case to explain his position:

> And now the European Court of Justice—sorry, human rights court gets Mrs. Bowman's claim that that limit on her campaign expenditure that few days before the election violated the freedom of expression that's guaranteed in the European Convention of Human Rights. Does that sound familiar, that issue? Now those are not great moral questions, or I'm just looking to their sentiment, but would I be reasonable to say I'm curious how they dealt with it? I'm not bound by it.[260]

He finds this a fitting means of inquiry because "There are differences, but as law students or professors or judges or practitioners, the similarities are far more important, and I've seen that in my life, in whatever -- are far more important than the differences"[261] between various nations' jurisprudences.

We have thus seen two radically different approaches to American law and aspirations that govern that law. Although this is an American project, it would seem

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[259] Scalia and Breyer "Full written transcript"
[260] Scalia and Breyer, "Full written transcript."
[261] Scalia and Breyer, "Full written transcript."

that, despite the importance of democracy to American critical veneration, the European traditions of openness to other legal systems and abilities to transcend, say the Bill of Rights for more recently written human rights conventions, would be more congruent with aspirational approaches to law. The American approach typified by Scalia and scholars like Jed Rubenfeld freeze American progress in democracy in the moment of the founding, which does not really allow for aspirational movement. As Rubenfeld insists: "[t]he U.S. Constitution differed in one fundamental respect from any democratic constitution that any large state had ever had: It was enacted through a process of popular deliberation and consent."[262] This emphasis on popular sovereignty is similar to Bruce Ackerman's take on American constitutionalism, inasmuch as both see consent as a measure of goodness (Ackerman also adds legality). But is that enough for an aspirational people?

Leaving aside how democratic the founding actually was given the absence of large segments of the population from its drafting,[263] we continue with Rubenfeld to his highly Scalian reasoning that the democratic essence of America "embod[ies] a particular nation's fundamental, democratically self-given legal and political commitments…Hence it is critical for constitutional law to be made and interpreted not by international experts, but by national political actors and judges,"[264] who understand our home-grown conceptions of rights, duties, and realities of American constitutional law. By contrast, aspirationalism seems to do much better with a Breyerian cast—one that allows for tradition and the American way but also is able to expand into international fora. As Breyer explains:

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[262] Rubenfeld, "Commentary," 1994.
[263] Smith, *Civic Ideals*.
[264] Rubenfeld, "Commentary," 1999.

> I believe that all of us…ha[ve] in a sense quite a similar framework that fits most legal cases. All of us look to texts, all of us are interested in history, all of us are interested in tradition, all of us are interested in precedent, all of us, in fact, want to understand the value or purpose that underlie the law, and all of us are interested in how our decision -- how it will turn out in terms of the consequences viewed through the prism of that value or purpose. But there are differences, I think, in the weights that different judges tend over time to give those elements in different cases.

This allows Justice Breyer to take from constitutional advances within and without our borders.

However, Justice Breyer's reaction to foreign jurisprudence has not been common, perhaps because of the lag in popular opinion to an earlier time when the U.S. Constitution was the paradigmatic constitution. As Sarah Harding puts it,

> Even popular opinion about the Constitution reflects a certain parochialism…Americans tend to think of questions of basic human rights and public policy almost exclusively in terms of their Constitution, as if it were the center and source of all such policies domestically and internationally. Indeed, even American insistence on the use of the terms 'civil' and 'constitutional' rights, rather than 'human' rights as used in other places, is evidence that a sense of shared common experience with other jurisdictions regarding such rights is missing.[265]

Furthermore, Bruce Ackerman made the complaint in 1997 that even law professors have not become comparativists. As he states: "The typical American judge would not think of learning from an opinion by the German or French constitutional court. Nor would the typical scholar—assuming, contrary to fact, that she could follow the natives' reasoning in their alien tongues."[266] He would criticize this dissertation for its parochialism, as he writes: "Over the past decade, we have been grappling with the original understanding of the Constitution of 1787, the Bill of Rights, and the Reconstruction Amendments with

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[265] Harding, Sarah K. "Comparative Reasoning and Judicial Review." *Yale International Law Journal.* (28 Yale J. Int'l L. 409) 2003

[266] Ackerman, Bruce. "The Rise of World Constitutionalism." *Virginia Law Review.* (83 Va. L. Rev. 771) 1997.

new intensity. Whatever the utility of this debate for Americans, it does not engage the texts that have paramount constitutional significance for the rest of the world."[267]

This is partially true and partially overstated. Americans—especially as a general population not made up mainly of law professors and judges—do have an extremely parochial view of constitutionalism, if they have any view of constitutionalism at all. Law professors and judges, however, have—with Scalian exceptions—moved towards a less parochial and more comparative stance in the last 15 years since Ackerman wrote that complaint. However, there are dangers to ignoring the needs of a specific country in favor of universal standards, something of which comparative constitutionalists are certainly aware. Thus, a balance is necessary, one we can find in studying Jan-Werner Müller's work on constitutional patriotism, because he is neither parochial with Justice Scalia nor overly universalist like Jurgen Habermas.

CONSTITUTIONAL PATRIOTISM: MEDIATING UNIVERSALISM WITH PARTICULARISM

In Jan-Werner Müller's conception, constitutional patriotism is meant

> to enable and uphold a liberal democratic form of rule that free and equal citizens can justify to each other. The object of patriotic attachment is a specific constitutional culture that mediates between the universal and the particular, while the mode of attachment is one of critical judgment.[268]

In the American context, the universal corresponds to inalienable rights found in the Declaration of Independence, while the particular refers more to the American civic religion about which Paul Kahn writes. His interpretation of civic religion that treats veneration with a bit of scorn, as he writes that "that we would yield political or legal authority to institutions and actors outside of this web of popular sovereignty and law's

[267] Ackerman, "The Rise of World Constitutionalism."
[268] Müller, "A general theory"

rule…appears to us as a form of political sin, a worshiping of false gods." But Müller's approval of "attachment" based on "critical judgment" in patriotic constitutionalism fits nicely with the critical veneration this dissertation aims to explain and encourage, rather than Kahn's view that is largely discouraging of American civil religion and the veneration of it.

How might this critical judgment between particular and universal actually work? There are criticisms, mainly in the literature about German constitutional patriotism, that this patriotism is either "'bloodless'" in its universalism or dangerous in its particularity.[269] It would be bloodless if it were unable to reach the souls of the citizenry because it congeals with the rest of the citizenry's beliefs, aspirations, and even history. History is also a problem for those who think constitutional patriotism is too particular, and it is here that Germany's Nazi past becomes relevant, as it is still unacceptable to romanticize German patriotism.

But, if we are able to be critical about both aspects of constitutional patriotism—universal and particular—it becomes a very useful concept to deploy. First, I will argue, against David Abraham, that a patriotism that is particular can surmount the objection that "as a theory for organizing a polity, national belonging needs—and assumes—more. It assumes some overarching, shared prepolitical community…"[270] This takes us back to Dieter Grimm and the integrative functions of constitutionalism. His first sentence in "Integration by constitution" declares, "When we speak of the integrative functions of constitutions, we are referring to the extralegal effects of a legal object."[271] He specifically cites the American Constitution "which is seen by many as the veritable

[269] Müller, *Constitutional Patriotism*
[270] Abraham David. "Constitutional patriotism, citizenship, and belonging." Int J Constitutional Law (2008) 6 (1): 137-152
[271] Grimm, Dieter. "Integration by Constitution." (2005) I-CON 3:2&3, 193.

embodiment of the national myth" to show how these extralegal effects might work.[272] In this mode, we can see particularities of constitutional patriotism in a different light. To be sure, there is more to America than the Constitution, particularly the strictly legal pieces that do not especially resonate with the American people. Yet the Constitution, and in particular the myth surrounding its creation as a document, are able to unite Americans as a people constituted by the Founders. If we add the Declaration of Independence into this equation, it is even easier to see how the national myth might work—namely, Americans can see themselves as a revolutionary people who possess certain rights enshrined in founding documents who have great aspirations for the future.

Returning to the critical piece of constitutional patriotism, we must remember how fluid the concept of critical veneration is over time. For example, we venerate a Constitution that changes over time, and thus our veneration cannot be fully stable. We also venerate different pieces of the Constitution differently in different times. As Müller notes, Frank Michelman argues that

> citizens are not asked to agree on or accept a particular constitution in all its specificity. In fact, it is perfectly reasonable for citizens to disagree even about constitutional essentials (and not just their application). Such disagreement will be likely, since a general justification, on the one hand, and application, on the other, cannot properly be separated…but it should come as no surprise that constitutions will serve as the site of intense, yet reasonable, moral and political contestation, not least in light of the core idea of fairness that is, as yet, imperfectly realized in any existing constitution.[273]

Müller disagrees with Michelman, however, that the legal aspects of the Constitution are all that there is. The legal, as I have been arguing, is only a piece of constitutionalism. Here I also stand with Müller. He states

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[272] Grimm, "Integration," 195.
[273] Müller, "A general theory"

> Constitutional patriotism is supposed to be reflexive. That is, it occasionally must be revised and refined in light of the further development and refinement of the principles at the heart of our constitutional regime. In that sense, it could also be called—drawing on a very Habermasian concept—a "collective learning process." It presumes an open future and the willingness of citizens to adjust the reasons, the object, and the mode of their attachment in light of new experiences; consequently, they see their constitutional culture as always open and incomplete—a project in which those in the past have been engaged and in which their descendants will invest.[274]

But within this quotation, we should immediately notice that it is not merely the principles of constitutions that must be revised—it is also the structures that those principles interpret. Thus constitutional culture must be seen as more than Müller's interpretation of constitutional patriotism. Most of all, this statement of Müller's in the American context should refer us back to *Federalist* 14 and Madison's praise of the American people for not relying too much on the past, for looking for a new way to constitute themselves. It is dangerous to go too far into Habermasian openness for fear of not retaining what is necessary to sustain a people who are connected by common traditions, including legal traditions. Müller understands this, as he states in the next paragraph that "We know that, practically speaking, polities cannot live in permanent states of self-questioning and ambiguity. The (highly stylized) point is about a basic attitude toward politics that calls at least sometimes for intense critical attention."[275] The same is true of critical veneration to some extent: in order to venerate we must sometimes be very firmly attached to the polity as it is. But Müller points to a sort of aspirationalism here. We can easily see someone like Frederick Douglass, Abraham Lincoln, or Martin Luther King Jr. practicing "intense critical attention." Thus, universalism and patriotism together can provide a fertile ground for nurturing critical constitutional veneration.

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[274] Müller, "A general theory," 19-20.
[275] Müller, "A general theory," 20.

PATRIOTISM: MY COUNTRY RIGHT OR WRONG?

In the preceding section, we established that too much universalism and not enough patriotism is unlikely to produce good results because rights need to be connected to the aspirational needs of a people of one particular place, as well as universalist rights. As Robert Schatz, Ervin Staub, and Howard Lavine report: "Patriotism is arguably one of the most important forms of group attachment in the modern world."[276] But, as they argue, patriotism is not uni-dimensional. There is a "theoretical distinction between 'blind' and 'constructive' patriotism," where "blind patriotism [is]…a rigid and inflexible attachment to country, characterized by unquestioning positive evaluation, staunch allegiance, and intolerance of criticism." By contrast, "constructive patriotism refers to an attachment to country characterized by 'critical loyalty,' questioning and criticism of current group practices that are driven by a desire for positive change."[277]

In Mark Tushnet's explication of his dichotomy between thick and thin constitutionalism, where the former are institutional forms and the latter aspirational content, he shows himself to understand why we might need constructive patriotism to understand the Declaration of Independence as a fixture in American constitutionalism. As he writes of Lincoln's apple of gold in the picture of silver, he states "The project the Constitution established for the people of the United States…was the vindication of the Declaration's principles: the principle that all people were created equal, the principle that all had inalienable rights. This is the thin Constitution."[278] Tushnet expands this statement by justifying his use of modern terms—"people" not "men," leaving aside religious terms—in the Declaration "to emphasize that the project is vindicating

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[276] Shatz, Robert T., Ervin Staub, and Howard Lavine. "On the Varieties of National Attachment: Blind Versus Constructive Patriotism." *Political Psychology*. 20:1 1999, 152.
[277] Shatz, Staub, and Lavine, "On the Varieties of National Attachment," 153.
[278] Tushnet, Mark. *Taking the Constitution Away from the Courts*. Princeton University Press: Princeton, 1999, 11.

principles. Those principles may differ from the interpretation Thomas Jefferson had," by expanding men to all people and eliminating deistic language.[279]

He then cites Frederick Douglass as an excellent example of a man who focused on the phrase "We the People" and understood it in the broadest sense possible, rather than the narrow sense that the founders might have understood it: "As Douglass understood, the national project includes vindicating the parts of the Constitution's Preamble that resonate with the Declaration…"[280] Tushnet argues that it is a populist Constitution that we are interpreting, not a creature of the Court, due only to be interpreted by the Court.

LINCOLNIAN AND ANTI-LINCOLNIAN THEORIES OF ASPIRATIONS

We also must remember that it is not merely a constitution that we are examining, but the conceptualizations of how we came to be constituted as a people. There are different ways to interpret how we ought to consider ourselves as a people. For example, some argue that the aspirational approach to principles is perfectionist: as Beau Breslin explains, "The act of writing a Constitution… commences a dialogue between text and citizen (and future generations) about the pursuit of political perfection."[281] This move towards perfection bases itself on aspirations that are generally put forth in preambles. Preambles are ideal places to put perfectionist principles not only for prominence but also to signal the fundamental commitments of a society. The American preamble is generally thought to be fairly well settled; as Liav Orgad states

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[279] Tushnet, *Taking*, 11.
[280] Tushnet, *Taking*, 12.
[281] Breslin, Beau. *From Worlds to Words: Exploring Constitutional Functionality*. Baltimore: Johns Hopkins University Press, 2008, 49 in Jacobsohn, *Constitutional Identity*.

> The United States probably has the best example of an integrative preamble. However, just as preambles can foster integration by forging a common identity, so also they can be disintegrative, driving people apart and contributing to social tension. This occurs when a preamble reflects only the story of a dominant group.[282]

On the other hand, as Rogers Smith argues against the perfectionist model, "many Americans also defined their core political identities in terms of their race, gender, religion, ethnicity, and culture. They warred passionately and often successfully against every force and faction that threatened to give the U.S. citizenry a different cast."[283] Thus even if Orgad is right about the American integrative preamble, it seems unlikely that members of different groups passionately warring against each other would interpret the text of that preamble in the same way. It would seem that we must question any perfection-based approach. It does not matter that Orgad is probably right that "The preamble of the U.S. Constitution is an example of Plato's concept of a preamble because it is persuasive, symbolic, and, generally, has no legal force."[284] If the persuasion and symbolism have the potential to inspire radically opposed groups, whether a preamble has legal force is no longer the question. The question becomes what inspiration can that preamble give to a multitude of groups in a system built on aspirational conflict?

Even what Abraham Lincoln considers our major aspirational principle—liberty—as showcased in the Declaration of Independence, means many different things to different people. However, Lincoln's aspirationalism in the quotation expressing this point is rather simple: liberty is our fundamental principle, and only it can hold together

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[282] Orgad, Liav. "The preamble in constitutional interpretation." 2011, 1-25, 18.

[283] Smith, Rogers. *Civic Ideals*. New Haven: Yale University Press, 1997, 4.

[284] Orgad, "The Preamble," 9. In Plato's *Laws*, preambles, or "preludes," to laws function as reasons to obey the laws set forth afterward. "For it became clear to me that this whole speech, which the speaker gives in order to persuade, is delivered with this end in view: so that he who receives the law uttered by the legislator might receive the command—that is, the law—in a frame of mind more favorably disposed and therefore more apt to learn something" 110. 723a-b. Plato. *Laws*. Ed. Thomas Pangle. New York: Basic Books, Inc. 1980 However, they do not have coercive force as the "tyrannical command" known as law.

the aspirations we have for our government in our Constitution. As Lincoln explains this in his "Fragment on Constitution and Union:"

> The *expression* of that principle, in our Declaration of Independence, was most happy, and fortunate. *Without* this, as well as *with* it, we could have declared our independence of Great Britain; but *without* it, we could not, I think, have secured our free government, and consequent prosperity. No oppressed, people will *fight*, and *endure*, as our fathers did, without the promise of something better, than a mere change of masters.
>
> The assertion of that *principle*, at *that time*, was *the* word, "*fitly spoken*" which has proved an "apple of gold" to us. The *Union*, and the *Constitution*, are the *picture* of *silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple—*not* the apple for the picture.[285]

Thus constitutional aspirationalism can be understood as a commitment to the principles—for I imagine that Lincoln would allow for additional ideals to join liberty in the pantheon of American principles—that create constitutional identity, so that "constitutional fulfillment can be measured and assessed in accordance with the progressive achievement of goals identified by constitutional actors."[286]

Yet for aspirationalists, principles—even contested ones—are the things that matter. Abraham Lincoln goes to the Declaration of Independence as well to justify liberty. By giving voice to a foundational principle, liberty, the Declaration of Independence plays a role ordinarily found in preambles:[287] it shows our deepest

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[285] Lincoln, Abraham. "Fragment on Constitution and Union." January 1861. Accessed 13 July 2011. <http://www.ashbrook.org/constitution/fragment.html>

[286] Jacobsohn, *Constitutional Identity*, 106.
But could Lincoln's words be interpreted in less progressive terms? Perhaps as a return to the past liberty that Americans enjoyed? Here again we must wonder if aspirationalism need always be progressive. This chapter will make the case that Lincoln was fundamentally progressive, but in the two short passages above, we could easily imagine a conservative wanting to return to previous times where liberty was guarded differently. What's more, this difference does truly exist. Even in interpreting rights specifically granted in the Constitution, liberty is fought over by at least two sides. For example, take *District of Columbia v. Heller*. 554 U.S. 570 (2008)

[287] In the Irish preamble seen below, commitments to Christianity, individual dignity and freedom, peace, and Irish unity, among other commitments, are emphasized.

aspiration in forming and maintaining our constitutional government.[288] In the contemporary literature, we see that Balkin starts his analysis with the Declaration of Independence because it "constitutes us" in a way that most of the Constitution does not.[289] Tushnet also begins from the Declaration because "The Declaration and the Preamble provide the substantive criteria for identifying the people's vital interests."

Mark Tushnet's "thin constitutionalism" is aspirational and is meant for people who are schooled in critical veneration. Without some aspect of critical veneration, the people would not be able to improve upon the Constitution themselves rather than relying on the Court to do so. Tushnet distinguishes between thick and thin constitutionalism: the thick Constitution includes the structures of the Constitutions, what we might think about as hard-wired or procedural features of the Constitution, "[t]he thin Constitution is different in this regard. We can think of the thin Constitution as its fundamental guarantees of equality, freedom of expression, and liberty."[290] These guarantees come

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"In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
We, the people of Ireland, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,
Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,
And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,
Do hereby adopt, enact, and give to ourselves this Constitution."
<< http://www.servat.unibe.ch/icl/ei00000_.html>> Accessed 14 August 2011.

[288] Gary Jacobsohn describes Lincolnian aspiration as progressive, but in a different way than we generally assume. "It is thus important to distinguish between change and progress when, as is so often the case, the two do not coincide. To make this distinction it is necessary to have a fixed standard against which progress can be assessed. Clearly, for Lincoln this standard is the Constitution and the timeless principles it embodies. This explains his desire to have the Constitution perceived as 'unalterable,' a conviction strengthened by his belief in the impossibility of improving upon the work of the document's authors. The fusion of constitutional law and moral theory does not, as in Dworkin, await achievement; rather it requires reaffirmation." Jacobsohn, Gary J. *The Supreme Court and the Decline of Constitutional Aspiration*. Totowa: Rowman & Littlefield Publishers, 1986, 107-108.

[289] Balkin, *Constitutional Redemption*, 19.

[290] Tushnet, *Taking*, 11.

from the Declaration of Independence and the Preamble to the Constitution, and Tushnet notes that Lincoln would have agreed with his notion of thin constitutionalism:

> Political scientist Gary Jacobsohn has helpfully retrieved an obscure note written by Abraham Lincoln, describing '[t]he Union and the Constitution' as 'the picture of silver,' the 'frame[],' around the 'apple of gold,' the principles of the Declaration of Independence: "The picture was made for the apple—not the apple for the picture.' The project the Constitution established for the people of the United States, Lincoln believed, was the vindication of the Declaration's principles: the principle that all people were created equal, the principle that all had inalienable rights. This is the thin Constitution.[291]

The frame, to use Lincoln's language, is binding in a court of law. Charles Black would argue that the apple is as well. Understanding constitutionalism through the frame and the apple together gives meaning to the frame and the apple gives voice to the people's aspirations.

But what would it mean to realize these aspirations? Mark Tushnet warns us against one approach, stating that we should guard against

> treat[ing] the Declaration and the Constitution as the organic seeds of a process that has been working *itself* out over history, almost without regard to what the people of the United States actually choose. That [opinion] denies that we are dealing with a *project*, that is, a self-creating activity in which the people of the United States daily decide whether to continue to pursue the course we have been pursuing. This expresses the Declaration's commitment to self government.[292]

Tushnet is right in one sense; it is deeply problematic because history is not an Hegelian exercise with the world just simply evolving towards the best aspirations of all the people. This statement, however, is correct insofar as the American project has been continuous over time and has maintained certain aspirations over that time. To not regard the Declaration and Constitution as seeds moves a bit too close to Ackerman's argument that I argued against in Chapter 4—namely, causing us to ask with Ackerman whether the

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[291] Tushnet, *Taking*, 11.
[292] Tushnet, *Taking*, 183.

project of America has substantially changed over time, particularly in constitutional moments that do not elucidate new pieces of a past program, but rather create new programs of work for the American people. The project of the Founders is our project today, whether they would recognize it or not. In the same way that the Anti-Federalists mentioned in Chapter 4 identified many of the developments that the nation was bent on a course to realize, especially the increasing trend towards nationalism, Abraham Lincoln and after him Martin Luther King Jr. looked back to Thomas Jefferson and the promises of the Declaration.

Tushnet also cites Lincoln arguing against those who disapproved of his suspending of habeas corpus, saying "'Are all the laws but one to go unexecuted, and the Government itself go to pieces, lest that one be violated?'" Tushnet correctly assesses Lincoln's reasoning, writing "As Lincoln saw it, the Constitution should be interpreted to advance the Declaration's project, when its terms were fairly open to such an interpretation."[293] Often it is the case that the Declaration's project is open, according to Tushnet: "But of course the Declaration's principles are not self-interpreting. People will inevitably disagree over the question of what policy actually advances the Declaration's project in particular circumstances."[294]

Whether the Constitution possesses this openness, however, is not as easy to discern as I have just quoted Tushnet to make it seem. Tushnet himself is aware of this, and notes that "A political leader will have to forge substantial agreement on the proposition he or she is asserting really does involve the vital interest of the people, often in the face of significant opposition."[295] This is the basis of what Tushnet calls populist

[293] Tushnet, *Taking*, 12-13.
[294] Tushent, *Taking*, 13.
[295] Tushnet, *Taking*, 24.

constitutional law. He means that not only do political leaders need to fight to get people to agree with their interpretations of the Constitution, but that "the Constitution belongs to us collectively, as we act together in political dialogue with each other—whether we act in the streets, in the voting booths, or in legislatures as representatives of others."[296] Thus, he defines populist constitutional law "as a law oriented to realizing the principles of the Declaration of Independence and the Constitution's Preamble. More specifically it is a law committed to the principle of universal human rights justifiable by reason in the service of self-government."[297]

This talk of universal human rights loops back to our discussion of universalism v. particularism. But Tushnet manages to avoid the universalist difficulty, which would distance his work from the quintessential American-ness of this project by inserting his populist constitutionalism as the arbiter of what universal human rights might mean. The Declaration of Independence was drafted by and is now interpreted by Americans, not by those not tutored in the American system and how that system is to work with the American institutions that were put into place at the same time as the Preamble.

THE DIFFICULTIES OF AMERICAN RIGHTS TALK

Finally we must consider what effects various permutations of discussions of rights are beneficial to the American system as far as civic consciousness and community are concerned. In this section we will not be concerned with universalist and particularist conceptions of rights, but rather what ends those rights serve, and in particular, do those rights serve to make us more responsible citizens. In her book, *Rights Talk*, Mary Ann Glendon writes of the difficulties of having "rights talk" rather than responsibility talk,

[296] Tushnet, *Taking*, 181.
[297] Tushnet, *Taking*, 181.

especially in the American context. She attributes this mainly to the absolute nature of our rights talk, noting that

> Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations…In its neglect of civil society, it undermines the principal seedbeds of civic and personal virtue…[298]

She is not wholly pessimistic about America's ability to change; in fact, on the next page, Glendon writes

> A refined rhetoric of rights would promote public conversation about the ends towards which our political life is directed. It would keep competing rights and responsibilities in view, helping to assure that none would achieve undue prominence and that none would be unduly obscured. It would not lead to the notion that freedom is being able to do anything you want.[299]

Jim Fleming and Linda McClain agree with these passages of Glendon's project in their work, *Liberalism with Responsibilities*, which is otherwise critical of Glendon's work, in large part because Glendon's communitarianism leads her to emphasize "*responsibility as accountability*."[300] By contrast, they agree with Ronald Dworkin's emphasis on "*responsibility as autonomy*." As they state, "responsibility as accountability connotes being answerable to others for the manner and consequences of exercising one's rights, whereas responsibility as autonomy connotes self-governance, that is, entrusting the right-holder to exercise moral responsibility in making decisions guided by conscience."[301] This autonomy discussion leads Fleming and McClain to one of their project's guiding principles: it "conceives the Constitution as a charter of positive

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[298] Glendon, *Rights Talk*, 14.
[299] Glendon, *Rights Talk*, 15.
[300] Fleming, James and Linda McClain, *Liberalism with Responsibilities*, forthcoming.
[301] Fleming and McClain, *Liberalism*, chapter 1, page 7.

benefits imposing affirmative obligations upon government to secure the preconditions for…justice,"[302] which ties together well with their contention that "government…has an important responsibility to carry out a formative project of fostering persons' capabilities for democratic and personal self-government."[303] These statements do not mean that all rights will be well used or morally used. This is neither shocking nor unreasonable.

However, there may be a difficulty with rights as autonomy versus accountability if we consider Fleming and McClain's educative project. How are we to convince people who understand the Constitution as a granter of "a charter of positive benefits…[and] preconditions for justice" that they should be "fostering…capabilities for democratic and personal self-government"? Looking at the Constitution as a rights-granting document is important. So is making the Constitution a just document. These are good goals, but they are not goals that make people look outside themselves as they will need to be good democratic citizens. It would seem to help quite a bit with personal self-government, insomuch as personal self-government requires much thought about what an individual needs. Democratic rights, on the other hand, require a broader conception of rights-bearing individuals and what they need both as an entire populace and as individuals who perhaps are minorities or members of minority groups. Is civic education enough to make us all respect each other in a democratic way? Is it enough to convince people who already enjoy certain rights to work to continue expanding rights to groups who have historically not enjoyed those rights?

In order to really understand what a democratic people needs, both Glendon's conmmunitarian conception of accountability and Fleming and McCain's Dworkinian conception of autonomy need to be meshed together. This is not to say that they will

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[302] Fleming and McClain, *Liberalism*, chapter 1, page 9.
[303] Fleming and McClain, *Liberalism*, chapter 1, page 13.

never be in tension, but others of our values conflict regularly as well. One good example is liberty and equality, which are often in conflict, liberty pushing us towards individualism and equality towards the collectivity. Just as individual rights are important, so is accountability to the community that protects those rights by virtue of protecting the community.

An education in the Declaration of Independence might just be enough. If all Americans can connect their own plights and the plights of their neighbors with the original complaints to King George III, perhaps they can understand why a critical faculty that promotes justice and rights is appropriate, and then move to a critical veneration of their system of government.

How does this explanation of rights meld with the rest of this chapter—namely, with the American particularistic use of human rights in constitutional law? First, under Fleming and McClain's conception of government as formative for democratic people, there are of course infusions of American understandings of what rights mean, how we get them, and how we are to use them. This educative project does not infringe on the liberty interest stated in the Declaration because that interest will not be trampled on by a Dworkinian approach to responsibility as autonomy. This autonomy, though guided by the government, and even Black's Declaration as law, makes it possible for citizens to conceive their version of the good within a fairly large framework. Both the Constitution and the Declaration are frameworks under which multiple worldviews fit.

But does the particularism of America make it impossible to have those multiple worldviews fit nicely? After all, Tushnet's notion of popular constitutionalism as advanced in this chapter could lead to illiberalism through democracy. The proper sort of rights/responsibility thinking, as explained in the last few paragraphs, easily fixes this. As we move forward towards the constitutional goodness achieved by proceeding

through the process of constitutional veneration, the trend in America is to be more inclusive. Of course there are steps forward and steps backward. However, once a group is settled with the pantheon of American rights and no longer is seen as an "outsider" group, it is unjustifiable to take those rights away.

Let us, in conclusion, take one issue of the last seventy years that shows the ability of our rights talk to move us closer to what we venerate in the Constitution today. Although the modern activist state is oft decried, particularly by the Republican Party, Social Security has become a third rail of American politics. President George W. Bush was unable to get his idea of private accounts for retirement instead of the traditional Social Security plan off the ground even though he had wide popular support following his election to a second term as President. Why is Social Security virtually untouchable? It is not because it is part of the so-called modern activist state, that is to be sure, because that does not have a particularly positive association for many Americans. It is because that particular social program has been absorbed into what Americans think of as their constitutional rights. Nowhere in the Constitution is a program like Social Security mentioned. Nowhere in the Declaration of Independence is a program like Social Security mentioned. But there are ways to justify the program under the kind of rights the Declaration mentions. Without the assistance of Social Security, elderly men and women might be denied their rights to life, liberty, and the pursuit of happiness. This argument appears bizarre at first. But without money for food, housing, health care, and sundry goods promoting happiness, it is possible to argue that seniors who could no longer work would be deprived of their rights under the Declaration.

But one needn't agree with that political argument to understand the main point: the Declaration has been read into the Constitution just as both are now read to encapsulate all rights to which Americans feel entitled. Certainly rights can contradict

each other, and so opponents of Social Security might consider the extra income tax they pay into Social Security to be an infringement of their liberty. The argument that results can proceed on constitutional grounds or on ordinary law grounds, but it is far more interesting as a constitutional argument. In order to have this constitutional argument, the people must consider their interests in life, liberty, and their pursuits of happiness, and argue from there. Educated as they should be, these bouts of contestation can help American democracy to flourish.

But how would this contestation look? First, it should not be dominated by a Court-centered approach. As valuable as the Court may be for minorities who have difficulty making their voices heard, it would seem that an issue as big as Social Security would not fit under that rubric of minority-protection. Rather, people, in their deliberative capacities, could influence their Representatives and Senators, as well as their President, to make a decision concerning this issue that would be more likely to fit well into our current framework of law. After all, Social Security is one of those issues that Fleming and McClain's formulation should work with: a charter of positive benefits given by the government to its people. Under this formulation, rights are not endangered by government action but are rather enhanced. The government is able to promote justice—a value of the Preamble—by extending certain rights to everyone.

To be sure, such an extension takes time and work. But when we consider how far we have come as far as what the Constitution means as regards rights, the future seems awfully bright. The Declaration of Independence does its work through a combination of particularism and universalism—a characteristic of the document's actual structure as well, as it goes from universal demands of rights to particular offenses that the King has committed. And finally, we can learn how to contest with each other using a form of popular constitutionalism that satisfies our desires to have a democratic polity

without endangering minorities who had to work quite hard to receive the true blessings of liberty.

Conclusion

In Sanford Levinson's *Our Undemocratic Constitution*, he ends his Introduction with the following call to thoughtful action:

> If I am correct that the Constitution is both insufficiently democratic in a country that professes to believe in democracy, *and* significantly dysfunctional, in the terms of the quality of the government that we receive, then it follows that we should no longer express our blind devotion to it. It is not, as Jefferson properly suggested, the equivalent to the Ark of the Covenant. It is a human creation open to criticism and even to rejection. To convince you that you should join me in supporting a new constitutional convention is what this book is about.[304]

Similarly, Larry Sabato's *A More Perfect Constitution: Why the Constitution Must be Revised—Ideas to Inspire a New Generation*, begins with the Preamble to our current Constitution, and states that although we have upheld the goals of the great Preamble over time, we have not updated "the basic structures and systems" of the Constitution. This leads Sabato to the conclusion that "We need to apply the ageless values contained in the Preamble to the new demands of a very different country than the one that existed in the founders' world. I have written this book to begin a discussion with you about why and how we must do so, and about the potent possibilities of such action."[305]

The type of work these two men do was mentioned in my Introduction, where I argued that the only people who talk about veneration anymore are the ones criticizing it. They use some of the same sources I do to make their points, among them *Federalist* 49[306] and the letter from Jefferson to Madison on the expiration of constitutions.[307] But

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[304] Levinson, *Our Undemocratic Constitution*, 9.
[305] Sabato, Larry J. *A More Perfect Constitution: Why the Constitution Must Be Revised—Ideas to Inspire a New Generation*. Walker Publishing Company, Inc.: New York, 2008, 1.
[306] Levinson, *Our Undemocratic Constitution*, 18-19.
[307] Sabato, *A More Perfect Constitution*, 7.

the most telling statement regards *Federalist* 14 in Levinson's new book, *Framed*, where he discusses how this particular *Federalist Paper* can make us think:

> We best honor the founding generation by forthrightly confronting the 'lessons of experience' and accepting Madison's mandate to view the national Constitution and its state analogues as works in progress. We must therefore use our critical intelligence to 'improve' them if they are to perpetuate themselves in time and, even more importantly, prove friends rather than enemies to achieving the great purposes most inspiringly set out in the Preamble to the national Constitution."[308]

From this quotation especially, we might think of both of these men as Jeffersonians. But before jumping to that conclusion, we should return to *Federalist* 40 and examine what it means to create a new system of law, as this is what these scholars are recommending. In the end, we will find that both of these scholars need a lot more veneration than they contend in order to make the kind of changes they recommend.

In *Federalist* 40, as we saw in Chapter 3, Madison discusses whether or not the Philadelphia Convention was authorized to create a new Constitution. He argues that it is based first on the stipulations for holding the Annapolis Convention, and then on the wording of the Congressional approval for the Philadelphia Convention, which included the instructions that the Philadelphia Convention was to address exigencies in government as well as the preservation of the Union. He argues that the Convention was also entitled to examine the principles of the Articles of Confederation, and concludes "The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation." Furthermore, he argues "The misfortune under the latter system has been, that these principles are so feeble and confined as to justify all the charges of inefficiency which have been urged against it, and to require a degree of

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[308] Levinson, Sanford V. *Framed: America's 51 Constitutions and the Crisis of Governance*. Oxford University Press: New York, 2012, 15.

enlargement which gives to the new system the aspect of an entire transformation of the old."[309]

These two last statements apply equally to the projects that Levinson and Sabato contemplate. Both value the principles of the American regime—after all, Sabato even begins his book with the Preamble to the Constitution, where, as this dissertation has argued, many of the main principles of the Constitution are found. But are we justified in continuing to call them Jeffersonian critics with no need of veneration? Jeffersonian veneration is not veneration proper, because veneration requires a reverence joined to the substance of the Constitution and its procedural pieces. Thus, because of their emphasis on keeping our principles alive while eschewing our institutions for better versions, anyone wishing to make arguments like Levinson's and Sabato's might consider him- or herself far from veneration.

Quite the contrary, neither project will work without veneration. Levinson and Sabato have given themselves a difficult assignment if we listen to cultural observers and historians like Michael Kammen and E.J. Dionne: they aim to take a people that venerates too much and turn them into critical Jeffersonian constitutionalists. However, I would argue that Levinson and Sabato are remiss if they are attempting to turn Americans into Jeffersonians. For several reasons it would be better—and conduce better to their projects—were they to turn Americans into critical venerators. As critical veneration builds on the blind veneration Americans already have, it would be an easier transition. But that is merely a question of efficacy, a question that is not made for books that dream big dreams of better constitutional institutions. Rather, we should consider how much

[309] Madison, *Federalist* 40

institutions matter to both Levinson and Sabato. They both value aspirations, but think that the institutions are what really matter to our national pursuit of happiness.

What then do Levinson and Sabato need to exist in a citizenry in order to make immense changes in institutions while maintaining key principles? They need a citizenry educated in a system that sees institutions as important, and not merely transient. They need a political culture to support those institutions. This political culture needs trust from the citizenry. Thus, Levinson and Sabato should side with Madison over Jefferson on the problematic nature of the idea of repeated constitutional conventions because of this need for trust. Right now, as Levinson and Sabato note, there is very little institutional trust in this country.[310] As both men think that is a problem, they should agree with me here that institutions require a degree of veneration to be said to be truly successful.

It is unlikely, however, that either would immediately agree with that statement. I agree with both Levinson and Sabato that at the moment, despite low approval ratings there is too much trust in the institutions of American government as institutions. Much of it is founder-worship, and that is simply a bad reason to support any form of government. James Madison said as much in *Federalist* 14:

> Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?[311]

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[310] For one example in Sabato's book, take his astounding chart of Congressional Disapproval Ratings, near 65% in May of 2007. Sabato, *A More Perfect Constitution*, 21.
Levinson's account is just as disturbing: Congress has a 12% "great deal of confidence" rating, the Presidency 33%, and the Court 34%. As a whole, in August 2011, "only 17 percent of those surved said that the present national government actually possesses the consent of the governed." Levinson, *Framed*, 3.
[311] Madison, *Federalist* 14.

In other words, we are wise not to let veneration for the past dictate our future. But it is also the case that people need a grounding in the past to understand the choices that change their future. It is not enough to agree with Levinson that our current system is bad or to like Sabato's suggestion for change: the people must understand fully what those incitements to change and actual changes will do to their political and institutional culture. Levinson and Sabato spend a good deal of time on the latter, but not much on the former. But political culture is incredibly important: it gives life to our aspirations in a world created by our institutions. As I have tried to establish in this dissertation: principles help us realize aspirations; principles along with institutions help us realize critical veneration.

Within our political culture, the people must also be educated to be concerned about the public good. No one is served if we have a new constitutional convention and the people scream the whole time, getting nothing accomplished. Compromise is necessary, though we hope that no compromise we make today will be as bad as past compromises. Once the government is created, the people must continue to care about their government. Reformers like Levinson and Sabato need a certain kind of people to be effective: they need a citizenry concerned with some aspect of the public good and one that is not too individualized to care about the collective. They must care about the government and see that public officials care about their welfare too. They need not only the universalist principles that Müller describes but also the particular principles that cause attachment to one's country—in other words, some aspect of veneration is necessary to make people care.

Finally, the people would require an education in being a constitutional people at all. This truth has been recognized for centuries, by men no less great than Aristotle, Rousseau, and Burke as I noted in the Introduction. This too requires veneration of

constitutions, otherwise men are too quick to venerate other men who rule for a moment, rather than a document or constitutive force meant to last lifetimes. This is one reason that James Madison refused to publish his notes on the Convention during his lifetime: he did not want his fellow Americans to deify the founders over the people who formed the document and the document itself.

Therefore, although neither Sanford Levinson nor Larry Sabato would call himself a critical venerator in the way I have described in this dissertation, I would argue that the people they aim to educate must be. A nation of critical venerators, like Douglass, or as we will see in the next section, King, understand the important tensions between faith and doubt, constitutional stability and emergency situations, and veneration and rebellion, just as Madison and Jefferson did.

VIOLENCE REDUX: BOUNDARIES AND EXCEPTIONS

There are many ways to initiate a new order. The Declaration of Independence was written amid enormous bloodshed by Americans and British alike, not to mention the French or the Native Americans. The same is true of the post-Civil War amendments, which would not have existed without the blood of two percent of the nation's population. But obviously violence is not always necessary to make social change, even important social change. Martin Luther King was successful in the Civil Rights Movement without using violence, indeed, by condemning it. One of his justifications for nonviolent protests is that if the protests become violent, they will later be a wedge between different sectors of society, preventing additional change and growth of America. As he states in his "The Birth of a New Nation":

> The aftermath of nonviolence is the creation of the beloved community. The aftermath of nonviolence is redemption. The aftermath of nonviolence is reconciliation. The aftermath of violence are emptiness and bitterness. This is the thing I'm concerned about. Let us fight passionately and unrelentingly for the goals of justice and peace. But let's be sure our hands are clean in this struggle. Let us never fight with falsehood and violence and hate and malice, but always fight with love, so that, when the day comes that the walls of segregation have completely crumbled in Montgomery, that we will be able to live with people as their brothers and sisters.[312]

King's reasoning here shows his desire not to create a factional group opposed to the permanent interests of the majority, as James Madison would have feared during such an uprising. He acknowledges the struggle between segments of the society, acknowledges that violence could lead to permanent factional strife, and then works against that threatening tide created by high tensions between the white and black communities. Peace and justice are objects of veneration that are deeply tied to the Constitution, which has to exist for reformers to refuse violence.

Instead, he worked to make African Americans a part of the rest of society. During his first major civil rights action, the Montgomery Bus Boycott, King was preaching at the Dexter Avenue Baptist Church in Montgomery. In his autobiography, he writes: "I took an active part in current social problems. I insisted that every church member become a registered voted and a member of the NAACP and organized within the church a social and political action committee—designed to keep the congregation intelligently informed on the social, political, and economic situations."[313] King orchestrated the necessary education in action, training protestors and disseminating information. He continued this method when the white leaders of the community falsely announced in the newspaper that the boycott situation had been resolved, hoping to get

[312] King Jr. Martin Luther. *A Call to Conscience*. ed. Claybourne Carson. New York: Grand Central Publishing, 2002, 32-33.
[313] King, *Autobiography*, 47.

blacks to ride the buses once again and break the power of the movement. However, as King had a social network of churches and ministers, he was able to contact those ministers to have them tell their congregations that the boycott was to continue, as well as rally support from his community to go to popular night spots in Montgomery to spread the word as widely as possible.[314] The 1960s Civil Rights Movement is an example of critical veneration in practice.

However, if we return to the Cover/Breslin distinction between physical and metaphorical violence, we see that even Martin Luther King had to deal in metaphorical violence. In his "Letter from Birmingham Jail," King confronts this issue of present understanding in his statements to the "white moderates." They ask him to slow down and obey the law to the letter. King's revolutionary movement will not allow this prioritization of law and order over justice and social progress. He states that he "had hoped that the white moderate would understand that the present tension in the South is a necessary phase of the transition from an obvious negative peace…to a substantive and positive peace" and that "we who engage in nonviolent direct action are not the creators of tension. We merely bring to the surface the hidden tension that is already alive."[315] However, King does foment a creative tension by opposing himself to slow evolutionists like the white moderates: he uses his words and actions to oppose aspects of American democracy that are supposed to be on the same side—law and freedom—to convince them that their stances are contrary to the values they claim to hold. Oppositions like these show politicians in power that certain laws and modes of behavior need to be killed in favor of allowing others to live. This is Frederick Douglass's metaphorical violence

[314] King, *Autobiography*, 72.
[315] King, Martin Luther. "Letter From Birmingham Jail." <http://www.mlkonline.net/jail.html> Accessed 15 December 2009.

that inspires him to continue his work after the Civil War as an orator and shaper of public opinion. King and Douglass also had the same aspirations—those portrayed in the Declaration of Independence and aspirational parts of the Constitution—and made those aspirations clear. Whatever success either man had was then predicated on the change of opinion, the change in the reading of laws that elicited from their words.

In King's case in particular, the audience was black America and his message was that the dream was open, that the promise could be redeemed without serious violence, or any violence at all. This shows progress in the American order past the depths of difficulties and violence with which Abraham Lincoln and Frederick Douglass had to contend. King needed to do less to get the change that he wanted than Lincoln or Douglass because some of his revolution had already been created by those men. At the very least, the American constitutional project had been advanced towards constitutional goodness with the redemptive project of freeing the slaves. Tasks like that are larger, and so violence may be required, whereas contemporaries of King like Malcolm X were misguided to believe that the situation had hit the violence threshold, where minds could only be changed with such great action. As Douglass says: "'The American public…discovered and accepted more truth in our four years of war than they learned in forty years of peace.'"[316] But violence in the late 1960s was not the most effective tool for convincing anyone of anything positive.

Rather, in the 1960s, there is a conflict over violence at the state level when the federal government deems state-sanctioned violence illegitimate violence. In that way, we can call this state-sanctioned violence both physical and metaphorical violence. Just as President Kennedy called in troops for physical force to integrate the schools,

[316] Goldstein, "Violence as an Instrument," 72.

President Johnson did metaphorical violence upon laws of the states by pushing through the Civil Rights Act and Voting Rights Act. King therefore needed the violence that the state was able to marshal with the National Guard and the Civil Rights Act of 1964. King provides the aspirational argument, along with the Warren Court's *Brown* ruling in 1954; the office of the Presidency joined by Congress provides the actual redemption of that aspirational argument by making and enforcing laws against discrimination. Thus, King is able to teach how far we can get without violence and how violence does not automatically overwhelm non-violence. The latter refers to King's opponents, who were unable to crush the Civil Rights Movement with violence, even the violence of killing King himself. King's movement, like Douglass's later in his life, was more about changing public opinion through intellectual, aspirational conflict and some measure of metaphorical violence in his civil disobedience rather than physical violence. These men were endeavoring to welcome new voices into the canon, which is still expanding as rights-protection expands, as we shall see in the next section on Ahkil Amar's work.

A RETURN TO THE SYMBOLISM NECESSARY FOR CRITICAL VENERATION

As Ahkil Amar argues in his new book on the relationship between the written and unwritten—or symbolic—American Constitutions, "each element of America's symbolic Constitution at some point in American history won the hearths and minds of a wide swath of the American people, thereby helping to bind citizens together as a legal and political entity."[317] This is true not only of the Constitution, but of the Declaration before it, and the *Federalist Papers* that convinced the "relevant" people to ratify it. But over time, texts like the Declaration and the *Federalist* "closely resemble the written

[317] Amar, *America's Unwritten Constitution*, 246.

Constitution itself: They are public, democratic, and uniform."[318] Amar lists among those texts also the Northwest Ordinance, the Gettysburg Address, and King's "I Have a Dream" speech. These are all texts that have become canonized and now, with a variety of other texts, represent a coherent body of aspirations. These texts even inspire a degree of veneration over time. Lincoln's Gettysburg address once was just a wartime speech, but now is an address that everyone in my grandfather's high school class in Gettysburg, PA was told to memorize not simply because they lived in Gettysburg, but mostly because of its importance to America and who we are as Americans.

As Lincoln puts it

> Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on his lap; let it be taught in schools, in seminaries, and in colleges; let it be written in primers, spelling-books, and in almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And in short, let it become the political religion of the nation…[319]

This is not the end of the process, of course, but it is the start. In order to critically venerate a government one must first love it. Lincoln emphasizes this love in his "Address before the Young Men's Lyceum of Springfield, Illinois," saying, "Let every American, every lover of liberty, every well-wisher to his posterity swear by the blood of the Revolution never to violate in the least particular the laws of the country, and never to tolerate their violation by others."[320] He makes this argument to dispute the justifiability of mob violence, even if the laws that Americans are to obey are unjust or bad. This argument may seem a bit odd considering that, after all, Lincoln broke the law himself. But I imagine Lincoln would argue with Jefferson about his suspension of habeas corpus if asked, using Jefferson's letter to John Colvin discussed in Chapter 3. Illegalities may

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[318] Amar, *America's Unwritten Constitution*, 246.
[319] Lincoln, *Writings*, 236-237.
[320] Lincoln, "Address before the Young Men's Lyceum of Springfield, Illinois." << http://www.constitution.org/lincoln/lyceum.htm>> Accessed 20 June 2012.

be justified by their necessity for the political order, but the one who takes upon himself the right to behave illegally is in great danger of making a mistake and behaving illegally according to false reasoning. Almost all illegalities are dangerous to the Union.

Therefore, all people should be reared in the way Lincoln suggests, so that their love for the American polity, Constitution, and other unwritten aspects of America and Americana are preserved, as in the example of the Civil Rights Movement. That love is then deepened by education about the nature of one's government, and eventually tempered by an understanding of the bad in the constitutional order. This more nuanced vision of government's successes and failures allows us to move forward with our constitutional goals and aspirations with a respect for the past and the future. Constitutional veneration takes this redemptive project and figures out a way to redeem the Constitution, which requires a movement towards democratic or populist constitutionalism.

One problem that crops up as we rely on the people is the continued support of the people. Lincoln himself admits in his "Lyceum address" that passion is no longer the engine of the Union—reason is.[321] This means that the question of legitimacy of the government often becomes an issue, because it is not solely veneration of the Constitution that drives legitimacy—some sort of intellectual connection must exist for real legitimacy to characterize a government. The people must desire to participate and actually do it for a democratic constitutionalist or populist government to exist. So, what is democratic legitimacy if the people are not inclined to participate? How could a regime whose actions consist mainly in the elected and appointed members of a government be democratically legitimate under Balkin's conditions? It is important to

[321] Lincoln, "Address."

remember that democratic legitimacy is not the sole form of legitimacy for Balkin: he also briefly writes about sociological legitimacy, procedural legitimacy, and moral legitimacy. Sociological legitimacy refers to popular acceptance of a government, procedural legitimacy to acting according to the legal rules and procedures of the government, and moral to just and moral action by the state. Procedural legitimacy is the most complicated of the three when we consider law in conjunction with metaphorical violence in protest movements like King's, which aim to realize the aspirations of the American polity. Perhaps because Balkin is missing an account of extra-institutional actors he is led to a dour vision of constitutional faith, where that faith "helps buttress our confidence in systems that are only minimally acceptable in their current state…may lead us to give the benefit of the doubt to the systems that are not yet adequate, but that might, with some alteration, become minimally acceptable…affects how we view deviations from what we regard as fair, just, and democratic…as mistakes or temporary failings" and because it centers our mind on what progress might mean in the future and keep us hopeful."[322] This description of faith seems weak because it does not seem reachable. No vision of redemption could guarantee progress, but it is possible to look at past redemptive projects to generate hope for the future. It is an interesting tension in Balkin's work that while his project tends towards guaranteeing that if we can escape the problems of constitutional tragedy and evil, we should progress just fine, his own description of the faith necessary to complete this project is not hopeful. Perhaps this stems from his distance from the people acting outside of government.

Any discussion of how we can involve the people at this point in the dissertation is obviously preliminary. But some reflections on how critical veneration might become

[322] Balkin, *Constitutional Redemption*, 49.

more widespread are obviously necessary. First, I would agree with Madison, Douglass, and King that the battle (using metaphorical violence) is a battle of public opinion. It is of a grander scope than public opinion polls collected daily, weekly, and monthly by political experts who aim to get their candidates elected, however. It is public opinion about our aspirations and where they should take us. The reason the canon Amar talks about is expanding because the mass of people have been convinced, not simply the elites.

Unfortunately, however, it seems in this analysis that these public opinion changes will not actually happen in the absence of great men and women leading the masses in support of their positions. This is somewhat worrisome if we are realists, or perhaps even pessimists, like James Madison, who argued that enlightened statesmen would not be around to lead our country. If this logic holds, then the same sorts of states-people are unlikely to pop up out of nowhere when needed.

However, there is a compelling argument based in the veneration we already have absorbed as citizens of this nation. If individuals are well educated and have any bent towards social criticism, and it seems that we have no shortage of these people, given the universal childhood veneration of the Constitution, they are ripe for conversion to critical veneration. With more and more young adults attending college, there are more opportunities for great minds to develop critical faculties. After that development, critical veneration is a relatively simple phenomenon to teach to the elites. But what of the masses more generally? This deserves more attention, but we should certainly take our cues from King on teaching people who feel disconnected to and disparaged by the state to join together in their own organizations (in King's case, church groups) to make productive metaphorical violence against laws contrary to our aspirations as a democratic, constitutional, and free people. These are not people who can only be well

served by the Court, but would benefit most from a robust democratic education along with the veneration they were most probably taught from an early age.

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